IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE

Petitioner,

v.

Case No. SC 02-2013
Lower Case No. 4D00-3873

NEW SEA ESCAPE CRUISES, LTD.,

Respondent.

PETITIONER FLORIDA DEPARTMENT OF REVENUE'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Petitioner, Florida Department of Revenue, Appellee below, will be referred to herein as "the Department." New Sea Escape Cruises, Ltd., Appellant below, will be referred to herein as "Sea Escape." The following designations will be used throughout this brief: [RI- __] or [RII-___] Record on Appeal with appropriate volume and page noted.

JURISDICTIONAL STATEMENT

Petitioner, Florida Department of Revenue, requests that this Court review the decision of the Fourth District Court of Appeal in New Sea Escape Cruises, Ltd. v Florida Department of Revenue, 823 So.2d. 161 (Fla. 4th DCA 2002) as within this Court's discretionary jurisdiction because it directly and expressly conflicts with the prior decision of this Court in Tropical Shipping & Construction Co. v. Askew, 364 So. 2d 433 (Fla. 1978). In addition, the First District Court of Appeal in its recent decision in Dream Boat, Inc. v. Department of Revenue, 2003 WL 1560175, ***4** (Fla. 1st DCA 2003) certified conflict with the Fourth District's decision in New Sea Escape Cruises, Ltd. v. Department of Revenue, 823 So. 2d 161 (Fla. 4th DCA 2002).

STATEMENT OF THE CASE AND FACTS

The issue in this case is whether Sea Escape is entitled to a partial exemption from the payment of certain sales and use taxes assessed by the Department of Revenue on Florida-based transactions in connection with the operation of its gambling ship on its "cruises to nowhere."[1]

Sea Escape is a Bahamian company, registered as a Florida dealer, that conducts its business in Florida. Sea Escape is engaged in the business of conducting "cruises to nowhere."[2] A "cruise to nowhere" is a type of entertainment "where the vessels leave and return to the State of Florida without an intervening stop within another state or foreign country, or waters within the jurisdiction of another state or foreign country." See State Board of Trustees v. Day Cruise Association, Inc., 794 So. 2d 696, 697 (Fla. 1st DCA 2001), rehearing denied, 798 So. 2d 847, rev. den., Florida Bd. of Trustees of Internal Improvement Trust Fund v. Day Cruise Association, Inc., 823 So. 2d 123 (Fla. 2002).

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[1]Gambling is prohibited in Florida. See generally, Chapter 849, Florida Statutes. Sea Escape possesses and operates its gambling equipment aboard its vessel under the Johnson Act. 15 U.S.C. Section 1171 et seq. See also Butterworth v. Tropic Casino Cruises, Inc, 796 So. 2d 1283, 1286 (Fla. 5th DCA 2001) which held that Section 849.231, Florida Statutes, exempts cruise to nowhere vessels who have registered under the Johnson Act and have complied with mandate of that statute.

[2]Sea Escape, on other occasions, also conducts cruises to the Bahamas, however, the treatment by the Department of that portion of the tax applicable to Sea Escape's Bahamian cruises was not at issue in the case below.

Sea Escape's vessels are equipped with gambling equipment such as slot machines and poker tables. [RI-246, 404, 406, and 534]. The gambling equipment is stored aboard the vessel while the vessel is docked at Port Everglades. [RI-409]. Maintenance on the gambling equipment is performed while the vessel is docked in Port Everglades or after the actual gambling activities cease at the end of the casino operation, that is, when the vessel returns to Florida territorial waters. [RI-6, 7, 21, 33, 34, 70, 534, and 551]. While the actual gambling is apparently conducted outside the territorial limits of Florida, the gambling equipment is delivered, installed, stored, maintained and serviced in Florida. [RI-6, 7, 21, 33, 34, 70, 409, 534, and 551].

Sea Escape's income consists primarily of passenger tickets (admissions), income from concession agreements, bar operations, gift shop sales and net gambling revenue. [RI-400].[3] There is a gift shop aboard the vessel, bars and dining facilities. Thus, in addition to gambling, the activities provided aboard the vessel during the cruise included gift shop sales, drinking and dining. [RI-1, 33, 57, 400]. The Department did not assess any tax on sales proven to have taken place outside the territorial limits of the State of Florida. [RI-2].

In addition to the cruises to nowhere, Sea Escape conducts one-day cruises to Freeport, Bahamas. During the audit period, Sea

[3]Sea Escape charges an admission fee for the cruises to nowhere on which it must remit tax to the Department. The tax on admissions is not an issue in this appeal.

Escape operated gambling “cruises to nowhere” seven times per week and separate cruises to the Bahamas four times a week. [RI-322, 324]. The Bahama cruises also began and ended in Fort Lauderdale. [RI-1, 33, and 57].[4]

The Department conducted an audit of Sea Escape’s books and records covering the period May 1, 1996 through April 30, 1998 (“the audit period”), in order to determine whether Sea Escape was collecting and remitting the correct amount of sales and use tax to the Department.[5] [RI-567]. As a result of the audit, the Department found that tax was due on admissions for “cruises to nowhere,” gift shop sales, consumable expenses, fixed assets, office supplies, stationary and printing, food costs, license to use beverage concession, the license to use gaming concession and on miscellaneous expenses. [RI-174-175].

On June 30, 1999 the Department issued a "Notice of Proposed Assessment" to Sea Escape which indicated outstanding sales and use tax in the amount of $718,725.25, penalty in the amount of $359,362.67 and interest through June 30, 1999 in the amount of $161,160.94, making a total assessment in the amount of $1,239,248.86, with additional daily interest continuing to accrue from July 1, 1999 at the rate of $236.29 per day. [RI-56]. The

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[4]The Department agrees that Sea Escape’s cruises to the Bahamas are properly prorated as foreign commerce under Section 212.08(8), Florida Statutes. Those transactions are not at issue in this case.

[5]Sea Escape was asked to submit certain records for the audit on different occasions.[RI-29, 174, 328, 333, 334, and 569].

Department did not assess tax on gambling proceeds or on documented sales outside the jurisdiction of the state of Florida.

On October 4, 2000 the Department issued a Notice of Reconsideration ("NOR"), upholding the assessment, which as of the date of the NOR totaled $1,343,925.33 in tax, penalty and interest.[6] [RI-1-12]. The Department assessed the following items in its Notice of Reconsideration: Issue I in the Notice of Reconsideration relates to the gift shop sales; Issue II in the Notice of Reconsideration relates to the allocation (i.e., "proration") factor for Sea Escape's taxable purchases; Issue III in the Notice of Reconsideration relates to the taxable use of the gambling equipment; and, Issue IV in the Notice of Reconsideration relates to taxability of the gambling concession as a taxable license to use. (RI-1-12]

As mandated by statute and rule, the Department used 31.744 percent as the apportionment factor to determine taxes due for taxable purchases of consumable vessel supplies, including fuel, vessel equipment, leasehold improvements,[7] and food cost as well as to Sea Escape's receipts of beverage concessionaire revenues and casino concessionaire revenue. [RI-3, 220, and 325]. In order to arrive at the apportionment factor, none of the miles in the cruises to nowhere were considered miles spent in interstate or

[6]Interest continues to accrue daily at the rate of $236.29.

[7]Sea Escape does not own the vessel, it leases it under a bareboat charter agreement with a related company.

foreign commerce because during a cruise to nowhere the vessel is not engaged in transportation of passengers to other ports. [RI-6, 33, 220, and 325]. The apportionment factor was computed as the number of miles navigated in cruises to nowhere divided by the total number of miles navigated by the vessel in both cruises to nowhere and Bahama cruises (278.3 ÷ 876.7 = 31.744 percent).

The discussion on page 3 of the NOR states that the proration factor applied to "consumable vessel supplies" (e.g., food costs); it does not discuss any challenge by the taxpayer to the taxability of the consumable supplies (including food, beverages and fuel). [RI-3]. On page 6 of the NOR the Department concluded that "since the vessel does not operate between a Florida port and any other port outside of Florida, domestic or foreign, in its cruise to nowhere operations, the allocation [not taxability] of use tax on the cost of consumable tangible personable property is not required or statutorily authorized." [RI-6]

The Department did not assess any income tax on gambling revenues or sales or use tax on documented sales occurring beyond the territorial jurisdiction of the State of Florida. Upon receipt of the NOR, Sea Escape served the Department with its Notice of Administrative Appeal to the Fourth District Court of Appeal on October 31, 2000. [RII-1].

On June 26, 2002 the Fourth District Court of Appeal held that Sea Escape was liable for sales and use taxes on proceeds from the lease of the vessel and its gambling equipment, the use of the gambling equipment and proceeds from the food concession agreement

and that such transactions were also subject to proration under Section 212.08(8), Florida Statutes. New Sea Escape Cruises, Ltd. v. Department of Revenue, 823 So. 2d 161, 163 (Fla. 4th DCA 2002). The Fourth District Court of Appeal denied the Department's subsequent motion for rehearing on August 7, 2002.

The Department filed its Notice to Invoke Discretionary Review before this Court on September 5, 2002 and filed its jurisdictional brief on September 17, 2002. The Department filed a Notice of Supplemental Authority in this case on March 27, 2003 citing the recent decision of the First District Court of Appeal in Dream Boat, Inc. v. Department of Revenue, 2003 WL 1560175, ***4** (Fla. 1st DCA 2003) (hereinafter "Dream Boat"), in which the First District held that a gambling ship cruise to nowhere is not foreign or interstate commerce and therefore the taxpayer is not entitled to the partial exemption of Section 212.08(8), Florida Statutes. The First District Court of Appeal certified its decision as being in conflict with the Fourth District Court of Appeal's decision in New Sea Escape Cruises, Ltd. v. Department of Revenue, 823 So. 2d 161 (Fla. 4th DCA 2002). This Court granted jurisdiction in this case by written order on May 15, 2003.

SUMMARY OF THE ARGUMENT

Section 212.08(8), Florida Statutes, provides a partial exemption for vessels engaged in foreign or interstate commerce. Sea Escape conducts gambling and entertainment activities on its cruises to nowhere without any intervening stop in another state or foreign country. A cruises to nowhere is intrastate commerce which is not entitled to the partial exemption of Section 212.08(8), Florida Statutes. Dream Boat, Inc. v. Department of Revenue, 2003 WL 1560175, ***3** (Fla. 1st DCA 2003) (hereinafter "Dream Boat").

The Fourth District Court of Appeal substituted its judgment for the judgment of the Legislature and the holding of this Court in Tropical Shipping & Construction Co. v. Askew, 364 So. 2d 433 (Fla. 1978) when it misapprehended Section 212.08(8), Florida Statutes, and held that Sea Escape's cruises to nowhere are entitled to the partial exemption. New Sea Escape Cruises, Ltd. v. Department of Revenue, 823 So. 2d 161, 163 (Fla. 4th DCA 2002)(hereinafter "Sea Escape"). Courts cannot "substitute their judgment for that of the Legislature." Askew v. Schuster, 331 So. 2d 297, 299 (Fla. 1976).

Chapter 212, Florida Statutes, does not expressly provide a sales tax exemption of any kind for a cruise to nowhere. Any exemption from taxation is to be strictly construed against the party claiming the exemption and in favor of the State. Capital City Country Club, Inc. v. Tucker, 613 So. 2d 448, 452 (Fla. 1993). The legislative intent of Section 212.08(8), Florida Statutes,

focuses on what the vessel is doing, not the activities (e.g., unregulated casino gambling) that occur on the vessel. The First District Court in Dream Boat understood this critical distinction: that the vessel must be engaged in foreign or interstate commerce for the partial exemption to apply. Dream Boat, at ***3**.

This Court should follow the decision in Dream Boat. The Fourth District's holding in Sea Escape that the transactions were both taxable under Section 212.05, Florida Statutes, and subject to proration under Section 212.08(8), Florida Statutes, is contrary to Florida law. This Court has stated that Section 212.21(2), Florida Statutes, "makes it unmistakably clear that as between the imposition of the tax or the granting of an exemption, the tax shall prevail." Department of Revenue v. Magazine Publishers of America, Inc., 604 So. 2d 459, 463 (Fla. 1992). The decision of the Fourth District should be quashed.

STANDARD OF REVIEW

This case involves the interpretation of Section 212.08(8), Florida Statutes. "[J]udicial interpretation of Florida statutes is a purely legal matter and therefore subject to *de novo* review." Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So. 2d 376, 378 (Fla. 5th DCA 1998), citing Operation Rescue v. Women's Health Center, Inc., 626 So. 2d 664, 670 (Fla. 1993), affirmed in part, reversed in part on other grounds, 512 U.S. 753 (1994). The standard of review in this matter is *de novo*.

ARGUMENT

This case involves the application of Section 212.08(8), Florida Statutes, to Florida gambling ship cruises to nowhere. The Department assessed taxes against Sea Escape for gift shop sales, purchases of consumables and equipment used on the vessel, and its license to use the gambling equipment. The Fourth District Court of Appeal in Sea Escape misapplied the language of the statute to extend a tax exemption to Florida transactions clearly taxable under Florida law.

I. THE PLAIN LANGUAGE OF SECTION 212.08(8), FLORIDA STATUTES, IS UNAMBIGUOUS AND WAS MISAPPLIED BY THE FOURTH DISTRICT

The starting point for interpreting the language of Section 212.08(8), Florida Statutes, is the text of the statute itself. Section 212.08(8), Florida Statutes, states in pertinent part:

> (**8) Partial exemptions; vessels engaged in interstate or foreign commerce.--**
>
> (a) The sale or use of vessels and parts thereof used to transport persons or property in interstate or foreign commerce, including commercial fishing vessels, is subject to the taxes imposed in this chapter only to the extent provided herein.
>
> ...
>
> The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier's vessels which were used in interstate or foreign commerce and which had at least some Florida mileage during the previous fiscal year.
>
> ...
>
> Vessels and parts thereof used to transport persons or property in interstate and foreign commerce are hereby determined to be susceptible to a distinct and separate classification for taxation under the provisions of this chapter.
>
> ...
>
> **Vessels and parts thereof used exclusively in intrastate commerce do not qualify for the proration of tax**. (emphasis supplied)

The purpose of the partial exemption of Section 212.08(8), Florida Statutes, is to avoid duplication of tax and to fairly apportion Florida tax when the transactions at issue affect or concern foreign or interstate commerce. "The purpose of the partial tax exemption [of Section 212.08, Florida Statutes] is to prevent the state from exceeding its powers to tax interstate and foreign commerce." Tropical Shipping & Construction Co. v. Askew, 364 So. 2d 433, 435 (Fla. 1978). This Court in Tropical Shipping has previously held that Section 212.08, Florida Statutes, passes constitutional scrutiny. Tropical Shipping, at 436. Section 212.08(8), Florida Statutes, is unambiguous on its face.

Since 1824 foreign commerce has been defined by the United States Supreme Court to be "... the commercial intercourse between nations, and parts of nations in all its branches." Gibbons v. Ogden, 9 Wheat. 1, 189-190 (1824). Commerce is interstate when it "concerns more states than one." Id., 9 Wheat. 194.

The decision of the Fourth District in Sea Escape failed to give effect to the last sentence of Section 212.08(8)(a), Florida Statutes, which states: "Vessels and parts thereof used exclusively in intrastate commerce do not qualify for the proration of tax." This Court has stated that when a court construes a statutory scheme, it may not question the "substantial legislative policy reasons" underlying the statute nor exercise any "prerogative to modify or shade" the "clearly expressed legislative intent" of the statutory enactment "in order to uphold a policy favored by the

court." Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). See also McDonald v. Roland, 65 So. 2d 12, 14 (Fla. 1953) (where the Legislature's intent is clearly discernible, a court's duty is to declare it as it finds it, and a court may not modify or shade it out of any considerations of policy).

The transactions at issue in Sea Escape (and similarly as to all Florida-based cruises to nowhere) are solely Florida transactions properly taxable by this state to which the partial exemption of Section 212.08(8), Florida Statutes, does not apply. This case does not involve any Florida taxation of gambling.

The Fourth District's holding in Sea Escape enables Sea Escape to avoid paying sales tax and creates a tax exemption where none exists in Florida law. See Section 212.21(2), Florida Statutes; as well as other tax exemption cases previously decided by this Court: Department of Revenue v. Anderson, 403 So. 2d 397 (Fla. 1981); Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498 (Fla. 1976); State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So. 2d 529 (Fla. 1973); U.S. Gypsum Co. v. Green, 110 So. 2d 409 (Fla. 1959). Any exemption from taxation is to be strictly construed against the party claiming the exemption and in favor of the state. Capital City Country Club, Inc. v. Tucker, 613 So. 2d 448, 452 (Fla. 1993). The Fourth District's holding is therefore contrary to law.

When the transactions at issue affect or concern solely intrastate (i.e., Florida) commerce, there is no danger of

duplication of tax and no need for proration of the tax. In applying the law to the facts of this case, it is clear that the Fourth District Court of Appeal either ignored or failed to consider the last sentence[8] of Section 212.08(8), Florida Statutes; the partial exemption does not apply to intrastate commerce and no proration is required. The holding of the Fourth District invalidated the purpose of Section 212.08(8), Florida Statutes, and created in its place a tax exemption for intrastate commerce which does not exist in the Florida's sales and use tax statutes as contained in Chapter 212, Florida Statutes. Section 212.08(8), Florida Statutes, states that the "basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier's vessels which were used in interstate or foreign commerce." The ratio effectuates the purpose of the statute which "allows Florida to tax the percentage of interstate and foreign commerce activity which occurs within Florida's boundaries." Tropical Shipping, supra. The purpose of the proration applicable to interstate and foreign commerce is to address federal Commerce Clause concerns. Only taxpayers engaged in foreign or interstate commerce qualify for the partial exemption.

This Court has long held that a statute must be read in its entirety. Sun Ins. Office, Limited v. Clay, 133 So. 2d 735, 737

[8]The last sentence of Section 212.08(8), Florida Statutes, provides that "[v]essels and parts thereof used exclusively in intrastate commerce do not qualify for the proration of tax."

(Fla. 1961). A basic tenet of statutory interpretation is that a statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts. Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 914 (Fla. 2001). Statutory interpretations that render statutory provisions superfluous "'are, and should be, disfavored.'" Johnson v. Feder, 485 So. 2d 409, 411 (Fla. 1986) (quoting Patagonia Corp. v. Board of Governors of Federal Reserve System, 517 F.2d 803, 813 (9th Cir.1975)).

The Fourth District Court of Appeal in Sea Escape misapprehended the legislative intent of Section 212.08(8), Florida Statutes, when it stated that the Department's position as to the applicability of Section 212.08(8), Florida Statutes, to a cruise to nowhere "which rests on whether the vessel stops in a foreign port, is a distinction without a difference." Sea Escape, at 163. This misapprehension of the Fourth District is conclusively established in the Fourth District's next comment in the opinion wherein it states: "The gambling does not occur 'within the state' as provided in Section 212.05." Id. ***Thus, The Fourth District's decision improperly shifted the focus from what the vessel was doing[9] to what Sea Escape was doing on the vessel[10]***.

The Fourth District's opinion too easily dismisses the reason for the proration: to prevent multiple or duplicate taxation. In

[9]I.e., Going just outside Florida's territorial limits but never leaving the United States territorial limits.

[10]I.e., Las Vegas-style casino gambling and entertainment.

order for Sea Escape's vessel to be engaged in foreign or interstate commerce the vessel must enter the territory or port of another foreign country or another state of this country. Gibbons v. Ogden, 9 Wheat. 1, 189-190 (1824); United States v. Morrison, 529 U.S. 598, 120 S.Ct. 1740 (2000). With respect to the transactions assessed in this case, the record in this case shows that Sea Escape's cruises to nowhere did not enter the jurisdiction of another state or any foreign country.

In the case of Tropical Shipping & Construction Co. v. Askew, 364 So. 2d 433 (Fla. 1978), Tropical Shipping was engaged in foreign commerce between Florida and the Bahamas mainly transporting goods which were loaded on trailers and in containers. Tropical Shipping, at 434. This intermodal method of shipping (in trailers over land and trailers and/or containers by ship overseas) has been characterized as "fishy-back." Id.

Finding little difference between a container and a trailer, this Court held both are entitled to the partial exemption of Section 212.08(9), Florida Statutes, and reading Section 212.08(9) *in Pari materia* with Section 212.08(8), Florida Statutes, held that the two statutes indicate a clear legislative intent to "grant the partial tax exemption to all accessories used for transporting goods in interstate or foreign commerce, whether the transportation occurs over land or over water." Tropical Shipping, at 436.

This Court stated in Tropical Shipping, at 436, that Florida's pro-ration of its sales and use tax "is a valid method for insuring that business engaged in interstate and foreign commerce pay their

fair share." Section 212.08(8), Florida Statutes, states that the "basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier's vessels which were used in interstate or foreign commerce." The ratio effectuates the purpose of the statute which "allows Florida to tax the percentage of interstate and foreign commerce activity which occurs within Florida's boundaries." Tropical Shipping, at 435.

This Court has also held that the courts of this state have no prerogative to alter or limit the legislative policy clearly expressed in the enactment in order to further a different policy or view preferred by the courts, including one favored by this Court. See Webb v. Hill, 75 So. 2d 596, 605 (Fla. 1954). The Fourth District's decision in Sea Escape, which fails to apply the last sentence of Section 212.08(8)(a), Florida Statutes, with the whole of Section 212.08(8)(a), Florida Statutes, is simply "at odds with the actual language of the statute," is contradictory to the purpose of the Chapter 212, Florida Statutes, and stands in direct conflict with this Court's opinion in Tropical Shipping.[11]

[11]See e.g. Jones v. ETS of New Orleans, Inc., 793 So. 2d 912, 918 (Fla. 2001) ("The Second District's opinion is at odds with the actual language of the statute, is contradictory to the purpose of the equitable distribution scheme and stands in direct conflict with our opinion in Baughman.").

II. A CRUISE TO NOWHERE IS INTRASTATE COMMERCE; IT IS NOT FOREIGN OR INTERSTATE COMMERCE

"Vessels and parts thereof used exclusively in intrastate commerce do not qualify for the proration of tax." Section 212.08(8), Florida Statutes. Sea Escape's cruises to nowhere are not entitled to the partial exemption under Section 212.08(8), Florida Statutes.[12] See Dream Boat, 2003 WL 1560175, at ***3**. The Department respectfully draws this Court's attention to a statement made by Sea Escape in its Reply Brief[13] filed in the Fourth District Court of Appeal wherein it stated that:

> ***[t]he Department's statement that Sea Escape's Cruises to Nowhere do not constitute interstate (between two states) or foreign (between two countries) commerce is correct***. It is precisely because Sea Escape conducts intrastate (within the state) commerce, in the form of Cruises to Nowhere that it is entitled to the apportionment pursuant to Section 212.08(8), Fla. Stat. (1996). Otherwise its operations would be completely exempt from Florida Sales and Use Tax, since it would be operating vessels solely in foreign commerce (Bahamian cruises) (emphasis supplied; footnote omitted).

Since 1824 foreign commerce has been defined by the United States Supreme Court to be "... the commercial intercourse between nations, and parts of nations in all its branches." Gibbons v. Ogden, supra. Commerce is interstate when it "concerns more states than one." Id. No decision of the United States Supreme Court has

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[12]During the audit Sea Escape conducted cruises to Freeport, The Bahamas. The Department agrees that Sea Escape's cruises to the Bahamas are properly prorated as foreign commerce under Section 212.08(8), Florida Statutes (It is undisputed that The Bahamas is a foreign country).

[13]Sea Escape's Reply Brief, page 10.

ever questioned this as too comprehensive a description of the subject matter of the Commerce Clause. United States v. Morrison, 120 S.Ct. 1740, 1766, 529 U.S. 598, 641 (2000) ("This plenary view of the power has either prevailed or been acknowledged by this Court at every stage of our jurisprudence.").

Foreign or interstate commerce requires a foreign destination. Great Lakes Dredge & Dock Company v. Department of Revenue, 381 So. 2d 1078, 1084 (Fla. 1st DCA 1979), cert. denied, 381 So. 2d 765 (Fla. 1980). The First District in Great Lakes Dredge & Dock Company relied on the United States Supreme Court's analysis of what constitutes foreign commerce as stated in Texas & New Orleans R. Co. v. Sabine Tram. Co., 227 U.S. 111, 33 S.Ct. 229 (1913). The First District further defined foreign commerce as "a continuous route or journey with a high degree of certainty that it is headed for its foreign destination and will not be diverted to domestic use." Great Lakes Dredge, at 1084. See also Bob-Lo Excursion Co. v. State of Michigan, 333 U.S. 28, 29-30(1948); Lynn v. Director of Revenue, 689 S.W.2d 45 (Mo. 1985); Branson Scenic Ry. v. Director of Revenue, 3 S.W.3d 788 (Mo. App. W.D. 1999); LaCrosse Queen, Inc. v. Wisconsin Dept. of Revenue, 561 N.W.2d 686 (Wis. 1997); Brent Leasing Co., Inc. v. State Tax Assessor, 773 A.2d 457, 462 (Me. 2001); United States v. Montford, 27 F.3d 137, 140 (5th Cir. 1994); United States v. One Colt Machine Gun, 625 F.Supp. 1539, 1540 (S.D. Fla. 1986)(which held that a boater leaving a boat ramp in Palm Beach County and who traveled north to near Vero Beach more than three (3) but not more than twelve (12) miles offshore,

did not transport guns in interstate or foreign commerce nor were the guns imported into the United States).

In the case of Brent Leasing Co., Inc. v. State Tax Assessor, 773 A.2d 457, 462 (Me. 2001) the Supreme Court of Maine held that a whale watching ship that took passengers into international waters was not engaged in foreign commerce and was not entitled to exemption from Maine sales and use tax. The Maine Supreme Court's construction of the sales and use tax exemption in question was "buttressed" by an analysis of a rule contemporaneously promulgated by the Maine Revenue Service (Rule 318.02) which states: "Personal property is not 'used as an instrumentality of interstate or foreign commerce' when carrying only cargo which both originates and terminates within the State of Maine." Brent Leasing, at 562.

Since there was no trial or final hearing this Court must look to the Notices of Decision and Reconsideration for the factual background in this case. The Department established in its Notice of Decision and Notice of Reconsideration that Sea Escape's vessel is not engaged in the transportation of people or property in foreign or interstate commerce except when traveling to a foreign port.[14] [RI-1-12]

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[14]The facts stated in the Notice of Reconsideration definitively establish all facts for the purpose of this appeal. JES Pub. Corp. v. Florida Dept. of Revenue, 730 So. 2d 854, 855 (Fla. 1st DCA 1999). The Fourth District in its opinion acknowledged that the transactions at issue in this case are purely Florida transactions and that no other jurisdiction was involved. Sea Escape, at 163.

The transactions at issue in this case are discrete events which a state may tax as long as the sale or use takes place within its borders. See Wardair Canada, Inc. v. Florida Department of Revenue, 477 U.S. 1, 106 S.Ct. 2369 (1986); Air Jamaica, Ltd. v. Department of Revenue, 374 So. 2d 575, 577-578 (Fla. 3rd DCA 1979), rev. denied 392 So. 2d 1371 (Fla. 1980). The Fourth District in Sea Escape found most of the transactions taxable; it simply misapplied the exemption statute. Sea Escape, at 163-64 ("We conclude that the various taxes assessed under section 212.05, in connection with the cruises to nowhere, must be prorated under section 212.08(8)."). See also, Dream Boat, at ***1** ("Accordingly, the [Department of Revenue] properly determined [Dream Boat's] rental of the slot machines to the cruise operators was subject to taxation.").

There simply is no violation of the Commerce Clause when the record in this case shows there are no activities that affect foreign commerce and no activities that affect interstate commerce. The federal Commerce Clause states: "The Congress shall have Power ... to regulate Commerce ... among the several states ..." Article I, Section 8, Clause 3, U.S. Constitution. The Commerce Clause is an affirmative grant of power; a federal commercial statute will reign supreme over a conflicting state statute.

In the absence of a conflicting federal statute, the limitation the constitution places upon a state's legislation falls within the scope of the "dormant Commerce Clause," thus:

[It is] accepted constitutional doctrine that the

> commerce clause, without the aid of Congressional legislation ... affords some protection from state legislation inimical to the national commerce and that in such cases, where Congress has not acted, this [U.S. Supreme] Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.

Southern Pacific Company v. Arizona, 325 U.S. 761, 769, 65 S. Ct. 1515, 1520 (1945). See also Quill Corporation v. North Dakota, 504 U.S. 298, 309, 112 S. Ct. 1904, 1911 (1992).

The seminal case that delineates a state's power to impose a tax upon a business' activities in a state is Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)[15]. The application of Complete Auto[16] is not appropriate in this case, but the Department submits that the Fourth District's misapprehension of Section 212.08(8), Florida Statutes, usurps the legislative mandate of the Florida Legislature where even the Federal Government and Courts would not be the final "arbiter."

Both the Fourth District and the First District held that the

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[15]A state's tax affecting interstate commercial activity will survive a Commerce Clause challenge when the tax (a) is applied to an activity that has a substantial nexus with the taxing state, (b) is fairly apportioned, (c) does not discriminate against interstate commerce, and (d) is fairly related to the services provided by the state. Complete Auto, at 279. The state of Florida's sales and use tax comports fully with these requirements. Although Complete Auto is the test to be applied in Florida when the constitutionality or the applicability of any tax is questioned under the Commerce Clause, there is no such challenge in this case.

[16] The Florida Supreme Court has expressly adopted the Complete Auto test in Delta Air Lines, Inc. v. Department of Revenue, 455 So. 2d 317 (Fla. 1984).

transactions at issue in this case took place entirely in the state of Florida and as such are taxable by Florida. Sea Escape, at 163-164; Dream Boat, supra. See also Section 212.21(2), Florida Statutes. The Fourth District in Sea Escape found that Sea Escape's installation and maintenance of its slot machines constituted a "use" under Section 212.02(20), Florida Statutes.[17]

Each transaction at issue in this case is a discrete event which Florida may tax because each sale or use that takes place within its borders. See Wardair, supra; Delta Air Lines, Inc. v. Department of Revenue, 455 So. 2d 317, 322 (Fla. 1984); Air Jamaica, supra. The Department assessed the following items in its Notice of Reconsideration: Issue I in the Notice of Reconsideration relates to the gift shop sales; Issue II in the Notice of Reconsideration relates to the allocation (i.e., "proration") factor for Sea Escape's taxable purchases; Issue III in the Notice of Reconsideration relates to the taxable use of the gambling equipment; and, Issue IV in the Notice of Reconsideration relates to taxability of the gambling concession as a taxable license to use.[18] (RI-1-12]

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[17]The Department does not agree, however, that these transactions, or any other in this case, should be prorated pursuant to Section 212.08(8), Florida Statutes.

[18] The discussion on page 3 of the NOR states that the proration factor applied to "consumable vessel supplies" (e.g., food costs); it does not discuss any challenge by the taxpayer to the taxability of the consumable supplies (including food, beverages and fuel). [RI-3]. On page 6 of the NOR the Department concluded that "since the vessel does not operate between a Florida port and any other port outside of Florida, domestic or foreign, in its cruise to nowhere

The Fourth District's decision never expressly states whether Sea Escape's cruises to nowhere are either foreign commerce, interstate commerce or intrastate commerce. The Fourth District substituted its judgment in place of the express legislative requirements of Section 212.08(8), Florida Statutes, when it implicitly found that Sea Escape's cruises to nowhere engaged in "foreign commerce" and that Sea Escape was therefore entitled to the partial exemption and proration under that statute. Alternatively, if the Fourth District concluded Sea Escape's cruises to nowhere were "intrastate commerce" it simply failed to read and apply the last sentence of Section 212.08(8), Florida Statutes, when it held Sea Escape's cruises to nowhere and its Bahamas cruises should be prorated. Sea Escape, at 165.

Both the circuit court and the First District in Dream Boat expressly held that the taxpayer's vessels were not engaged in interstate or foreign commerce. Dream Boat, at ***2**. This Court should follow Dream Boat and hold that all of the transactions at issue in this cruise to nowhere case assessed by the Department of Revenue occur in Florida, have substantial nexus with Florida and do not constitute foreign or interstate commerce.

In conducting its business operations in connection with its gambling ship cruises to nowhere, Sea Escape availed itself of Florida's port facilities, roads, local police and fire protection,

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operations, the allocation [not taxability] of use tax on the cost of consumable tangible personable property is not required or statutorily authorized." [RI-6]

and banking infrastructure. Sea Escape provisioned the vessel (food, beverages and supplies) at the dock in Florida. Sea Escape cannot argue that sales taxes cannot be imposed "regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future." TA Operating Corp. v. Department of Revenue, 767 So. 2d 1270, 1276 (Fla. 1st DCA 2000), rev. denied, 790 So. 2d 1108 (Fla. 2001), cert. denied, ____ U.S. ___, 122 S.Ct. 212 (2001).

In TA Operating, the taxpayer TA sought a refund of special taxes paid and argued that because the fuel was delivered to a common carrier for export to Georgia, a Florida fuel tax on the sale violated the Commerce Clause. The First District Court of Appeal rejected TA's argument and found that the special tax on fuel did not violate the dormant Commerce Clause test of Complete Auto' Transit, Inc. v. Brady, supra, and held that since the fuel was purchased in Florida, the nexus test was met. TA Operating, at 1274. As with the tax statutes at issue in this case, the First District noted that the special fuel tax at issue in TA Operating was "fairly related" to public resources provided by Florida and utilized by TA, including roads, police and fire protection, and the "other advantages of a civilized society" that makes Florida a suitable place for the transactions, regardless of TA's intention to export the fuel. TA Operating, at 1276; see also Delta Air Lines, at 323-324. In this case, Sea Escape avails itself of all

those same benefits[19] of conducting a business in Florida noted by the First District in TA Operating, and because the transactions at issue in this case have nexus with Florida they are subject to Florida sales and use tax.

In Section 212.08(8), Florida Statutes, the Legislature created a distinct class of taxpayers whose vessels are partially exempt when they are engaged in the transportation of people or property in foreign or interstate commerce. Section 212.08(8), Florida Statutes, does not provide a partial exemption when a vessel engages in intrastate commerce.[20] "Vessels and parts thereof used exclusively in intrastate commerce do not qualify for the proration of tax." Section 212.08(8), Florida Statutes. Sea Escape is not a member of this distinct class of taxpayers which qualify for the partial exemption of Section 212.08(8), Florida Statutes.

III. THE DECISION OF THE FIRST DISTRICT IN DREAM BOAT CORRECTLY APPLIED THE PROVISIONS OF SECTION 212.08(8), FLORIDA STATUTES

In contrast to the Fourth District, the First District Court of Appeal in Dream Boat arrived at the correct decision and provides well-reasoned guidance to this Court. The First District

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[19]Including, but not limited to, police and fire protection, facilities maintained at the vessels' berth at Florida ports, the intracoastal waterway, the banking system and related regulations, and roads for gambling customers traveling to the vessel.

[20]The Legislature is presumed not to pass meaningless legislation. Smith v. Piezo Technology and Professional Administrators, 427 So. 2d 182, 184 (Fla. 1983).

held that a gambling ship cruise to nowhere, like Sea Escape's cruises to nowhere, constituted intrastate commerce which is not entitled to the partial exemption of Section 212.08(8), Florida Statutes. Dream Boat, Inc. v. Department of Revenue, 2003 WL 1560175, ***3** (Fla. 1st DCA 2003). In addition, the First District found that Dream Boat could not overcome its burden to prove it was entitled to the partial exemption because it "cannot show its vessels are engaged in interstate or foreign commerce." Dream Boat, 2003 WL 1560175, at ***2**. The First District correctly framed the question at issue in this case as "whether the vessels transport persons or property in foreign commerce." Dream Boat, 2003 WL 1560175, at ***2**.[21] The answer to this question is crucial because it embodies the heart of the legislative intent of Section 212.08(8), Florida Statutes, and the purpose for which it was enacted. See Tropical Shipping, supra.

Sea Escape's cruises to nowhere are not engaged in "transportation."[22] Since Sea Escape's vessel neither transports

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[21]It was conceded by Dream Boat that no interstate commerce was involved with its gambling ship cruises to nowhere.

[22]The root word "transport" means "to carry from one place to another." American Heritage Dictionary, 10th Edition. Commerce and transportation go hand in hand. "At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes." U.S. v. Lopez, 514 U.S. 549, 585-586, 115 S.Ct. 1624, 1643 (1995) (Justice Thomas concurring) (citation omitted, emphasis supplied). Justice Thomas found support in the etymology of the word which literally means "with merchandise." Lopez, at 586. In fact, Justice Thomas wrote, "when Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce

people nor any goods in commerce it is not engaged in interstate or foreign commerce so as to qualify for the exemption under Section 212.08(8), Florida Statutes. See L. B. Smith Aircraft Corp. v. Green, 94 So. 2d 832, 836 (Fla. 1957) (the Florida Supreme Court has held that the phrase "passengers or property in interstate and foreign commerce"[23] must be interpreted in "its narrower sense" and refers "to a public business of transport for value...").

There is no finding in the record that Sea Escape is in the "public business" of transporting people or goods for value under any federal or Florida law. On the contrary, Sea Escape is in the business of providing "legal" (i.e., out-of-Florida) gambling and other entertainment to its passengers on board the vessel. Sea Escape, at 161.

Sea Escape, as did the taxpayer in Dream Boat, availed itself of Florida's port facilities, roads, police and fire protection, financial institutions and provisioned the vessel (food, beverages and supplies) at its dock in Florida. In addition, the slot machines are "used" in the state of Florida when the vessel is docked within Florida waters by simply being on the vessel.[24] See

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interchangeably." Id. (emphasis supplied) Justice Thomas concluded his analysis by stating that "[a]griculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles." Lopez, at 587 (emphasis supplied).

[23]The current phrase in Section 212.08(8)(a), Florida Statutes, reads "persons or property in interstate or foreign commerce."

[24]"Use" has a technical meaning in Chapter 212, Florida Statutes, as it relates to tax matters. Section 212.02(20),

Section 212.02(20), Florida Statutes. The fact that Sea Escape operates the gambling equipment (slot machines, roulette and the like) outside Florida's territorial waters is not relevant to the transactions taxed in this case. Furthermore, the fact that Sea Escape operates the casino gambling equipment outside Florida's territorial waters is in no way determinative or dispositive of this case.[25]

Section 212.08(8), Florida Statutes, clearly denies the partial exemption to intrastate commerce as was recognized by the First District in Dream Boat. Dream Boat, 2003 WL 1560175, at ***3**. The Fourth District below ignored the purpose of the partial exemption statute when it focused on the gambling rather than what the vessel was doing. The application of pertinent statutes in a tax assessment case is much preferred over any proposed "test" or theory. See e.g. American Telephone and Telegraph Co. v. Department of Revenue, 764 So. 2d 665, 666 (Fla. 1st DCA 2000).

Florida Statutes, provides in pertinent part: "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it does not include the sale at retail of that property in the regular course of business.

[25]The United States Supreme Court observed "that the President's proclamation [Presidential Proclamation No. 5928, Dec. 27, 1988, 54 F.R. 777, "Territorial Sea of United States of America"] of a 12-mile territorial sea for international law purposes functionally established a distinction between the international and the federal-state boundaries." U.S. v. Alaska, 503 U.S. 569, 589, fn. 11 (1992). Arguably, since August 2, 1999, the territorial sovereignty of the United States now extends twenty-four (24) miles from the coastal baseline. Proclamation No. 7219, August 2, 1999, 64 F.R. 48701. Thus, the high seas begin today after 24 miles.

In American Telephone and Telegraph Co. v. Department of Revenue, 764 So. 2d 665, 666 (Fla. 1st DCA 2000) (hereinafter "AT&T") the First District held that sales of systems engineering services together with telephone switching equipment were subject to sales tax and that rather than applying one of the "tests" or theories proposed by the taxpayer "the trial court simply, and properly, applied the pertinent statute, Section 212.02(4), Florida Statutes (1983), to the sales in this case."

Rather than making up its own "test" in considering whether the sale of engineering services along with systems engineering was taxable under Chapter 212, Florida Statutes, the First District, at 666, simply followed the statute (Section 212.02(4), Florida Statutes (1983)) saying:

> [P]ursuant to Florida's taxing scheme, some services are taxable and the Legislature has provided the applicable "test": "any services that are a part of the sale, valued in money, whether paid in money or otherwise" are taxable.

Simply put, the First District found the statutory definition a sufficient "test" when applying the law to the facts of the case.

The Fourth District did not employ the same approach as the First District in AT&T. However, the First District in Dream Boat properly affirmed the trial court's both lawful and proper application of the express text of Sections 212.05 and 212.08(8), Florida Statutes, to the facts in that case and rejected the theories of the taxpayer (Dream Boat) which are not found in Florida law. AT&T, supra. This Court, like the First District in Dream Boat should reject the "theories" of the taxpayer Sea Escape

as interpreted by the Fourth District Court of Appeal.

The Fourth District Court of Appeal in Sea Escape construed an unambiguous statute in a way which modified and limited the express terms of Section 212.08(8), Florida Statutes.[26] The Fourth District's modification and limitation of the statute resulted in an "abrogation of legislative power" which is contrary to case law of this Court. Holly v. Auld, at 219.

Although the Fourth District expressly relied on Tropical Shipping in holding that Section 212.08(8)(a), Florida Statutes, applies to Sea Escape, the Court did not and could not find that Sea Escape was engaged in the transportation of persons or property in interstate or foreign commerce. Sea Escape, at 163. Furthermore, in its Reply Brief filed with the Fourth District, Sea Escape conceded that its cruises to nowhere are not engaged in interstate or foreign commerce.[27] Therefore, in addition to being contrary to express text of the last sentence of Section 212.08(a), Florida Statutes, the decision of the Fourth District in Sea Escape is also contrary to the express holding by this Court in Tropical Shipping, supra. This Court must quash the Fourth District's decision below and adopt the holding and rationale of the First District in Dream Boat, supra.

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[26]Ambiguity suggests that reasonable persons can find different meanings in the same language. State v. Huggins, 802 So. 2d 276, 277 (Fla. 2001). The Department submits that there is no ambiguity in Section 212.08(8), Florida Statutes. Since there is no finding of ambiguity by the Fourth District in Sea Escape that Court simply misapprehended the legislative intent of the statute.

[27]See the Department's Initial Brief text supra, page 17.

CONCLUSION

A cruise to nowhere is not foreign or interstate commerce. Sea Escape's gambling ship cruises to nowhere constitute solely intrastate commerce. This Court should follow the holding of the First District Court of Appeal in Dream Boat. The Department of Revenue respectfully requests that the decision of the Fourth District Court of Appeal in Sea Escape must be reversed as to its misapplication of Section 212.08(8), Florida Statutes.

Dated at Tallahassee, Florida, this 9th day of June, 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that Department's Initial Brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P., in that this Brief uses Courier New 12-point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class U.S. Mail to: Ronald Marini, Esquire, Marini & Associates, Two South Biscayne Boulevard, Suite 3580, Miami, Florida 33131, Counsel for Respondent, on this ___ day of June, 2003.

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