

IN THE SUPREME COURT OF FLORIDA

Deerbrooke Investments, Inc.,

Petitioner,

SC Case No.: _____

4DCA Case No. 4D01-5403

v.

FLORIDA DEPARTMENT OF REVENUE

Respondent.

_____ /

On Review from the District Court of Appeal,
Fourth District, State of Florida

**PETITIONER'S, DEERBROOKE INVESTMENTS, INC.,
BRIEF ON JURISDICTION**

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CASES

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FEDERAL CONSTITUTIONAL PROVISIONS

United States Constitution 1

Article I, Section 8
United States Constitution 2

**FLORIDA CONSTITUTIONAL PROVISIONS, STATUTES AND OTHER
AUTHORITIES**

Chapter 120, Florida Statutes 1

Section 212.08(8), Florida Statutes 1-2

Article V, § 3b(3), Florida Constitution 3

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STATEMENT OF THE FACTS AND THE CASE

Deerbrooke Investments, Inc. ("Deerbrooke") is a Panamanian corporation which operates gaming "cruises to nowhere" from the Port of Palm Beach on the vessel Palm Beach Princess. (Op. at 1) On its gaming cruises, the Palm Beach Princess sails outside the territorial limits of Florida where gambling is conducted pursuant to federal law, and then returns to the Port of Palm Beach. The Florida Department of Revenue ("Department") conducted a sales and use tax audit of Deerbrooke and issued a proposed assessment of sales and use tax on (i) the Palm Beach Princess and all its equipment, including leased equipment, (ii) revenues from concessionaires, (iii) food purchased for consumption by the passengers and (iv) rental of real property. (Op. at 1)

Deerbrooke challenged the proposed assessment under Chapter 120, Florida Statutes, and timely appealed an adverse decision to the Fourth District Court of Appeal ("4th DCA"). In both proceedings, Deerbrooke argued that it was exclusively engaged in foreign commerce on its gaming cruises and was entitled to the total exemption from sales and use tax provided by Florida Statutes, § 212.08(8), and the United States Constitution. (Op. at 1, 2)

The 4th DCA relied upon its recent decision in *New Sea Escape Cruises, Ltd. v. Florida Department of Revenue*, 823 So. 2d 161 (Fla. 4th D.C.A. 2002), *rev. granted*, 845 So. 2d 889 (Fla. 2003) to hold that Deerbrooke was entitled to a partial exemption from Florida's sales and use tax for its leased gaming equipment and rent from concessionaires based upon the ratio of miles outside Florida waters to total mileage. (Op. 2) Although the opinion is not completely clear on this point, the Court's holding on the partial exemption apparently applies to the use tax on the Palm Beach Princess and its ancillary equipment as well as to the leased gaming equipment and concessionaire rents.

The 4th DCA also upheld the Department's proposed assessment of sales and use tax on food purchases for passenger consumption and the rental of real property. (Op. 3)

Following issuance of the opinion, the Department filed a Motion for Rehearing or Clarification, and Deerbrooke filed a Motion for Rehearing and to Abate Action. Both motions were denied by the 4th DCA Order dated November 26, 2003.

SUMMARY OF ARGUMENT

Deerbrooke is continuously engaged in foreign commerce within the meaning of Article I, § 8, of the United States Constitution, and is entitled to a complete exemption from the Florida sales and use tax under Florida Statutes, § 212.08(8), which is designed to avoid imposition of the Florida sales and use tax in an unconstitutional manner. In reaching its decision, however, the 4th DCA relied upon its decision in *New Sea Escape*, where these arguments were not presented. (Op. at 2,3) As the 4th DCA noted, its decision in *New Sea Escape* conflicts with the decision of the First District Court of Appeal in *Dream Boat, Inc. v. Department of Revenue*, 28 Fla. Law Weekly D837 (Fla. 1st D.C.A. March 27, 2003). (Op. at 2) The decision of the 4th DCA in the instant case is identical to its decision in *New Sea Escape*, and therefore it also conflicts with *Dream Boat*.

Moreover, the *Deerbrooke* and *New Sea Escape* cases present identical relevant facts and legal issues, and judicial consistency requires that both cases be decided identically.

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly

and directly conflicts with a decision of the Florida Supreme Court or another district court of appeal on the same point of law. Art. V, § 3b(3) Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

The decision of the 4th DCA in this case relied exclusively upon its prior decision in *New Sea Escape*, which is presently under consideration by this Court. The 4th DCA admittedly did not consider the United States Constitutional arguments in its *New Sea Escape* decision, and the 4th DCA did not decide whether Deerbrooke was engaged in foreign commerce on its gaming cruises. (Op. at 2,3).

The 4th DCA noted that the 1st District Court of Appeal in *Dream Boat* certified conflict with *New Sea Escape*, and because the instant decision is identical to the *New Sea Escape* decision, the same conflict is presented between the instant case and *Dream Boat*. Therefore, this Court has discretionary jurisdiction to review the 4th DCA's decision in the instant case.

This Court has granted review of the 4th DCA's decision in *New Sea Escape*, 845 So. 2d 889 (Fla. 2003).¹ If this Court decides *New Sea Escape* differently than the 4th DCA, but declines to review the instant case and decide it identically, then two cases, proximate in time, with identical relevant facts and legal issues would have different results. This Court has long held that its discretionary jurisdiction should be exercised to avoid "a real and embarrassing conflict of opinion and authority between decisions." *Hastings v. Osius*, 102 So. 2d 21 (Fla. 1958); *Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958).

CONCLUSION

This Court has discretionary jurisdiction to review the decision below, and should exercise that jurisdiction to resolve the express and direct conflict between the instant case and *Dream Boat*, to ensure that *New Sea Escape* and the instant case, having identical relevant facts and legal issues, ultimately reach identical legal conclusions, and to consider the United States constitutional and related arguments raised by Deerbrooke.

¹ Deerbrooke filed its brief as amicus curiae in the proceedings before this Court in *New Sea Escape*.

CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by United States mail to Nicholas Bykowsky, Esq., and Martha F. Barrera, Esq., Assistant Attorneys General, Office of the Attorney General--Tax Section, The Capitol, Tallahassee, FL 32399-1050, counsel for Petitioner, Florida Department of Revenue, this _____ day of December, 2003.

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I hereby certify that this brief complies with the type size and style requirements and has been prepared in Courier New, 12 point font.

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