**IN THE SUPREME COURT OF FLORIDA**

**DEPARTMENT OF REVENUE,**

**Petitioner,**

**v.** **Case No. SC03-____**
**L.T. Case No. 4D01-5043**

**DEERBROOKE INVESTMENTS, INC.,**

**Respondent.**

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# PETITIONER FLORIDA DEPARTMENT OF REVENUE'S JURISDICTIONAL BRIEF

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## JURISDICTIONAL STATEMENT

Petitioner, Florida Department of Revenue ("the Department") requests that this Court review the decision of the Fourth District Court of Appeal in Deerbrooke Investments, Inc. v. Florida Department of Revenue, Case No. 4D01-5043 (Fla. 4th DCA September 10, 2003), rehearing denied, November 26, 2003. See Appendix 1. The Court has discretion to review that decision because it is in express and direct conflict with a prior decision of this Court in Tropical Shipping & Construction Co. v. Askew, 364 So. 2d 433 (Fla. 1978), as well as other tax exemption cases previously decided by this Court. See e.g. Department of Revenue v. Anderson, 403 So. 2d 397 (Fla. 1981). Further the Fourth District's decision in Deerbrooke is consistent with its prior decision of New Sea Escape Cruises, Ltd. v. Florida Department of Revenue, 823 So. 2d 161, 163 (Fla. 4th DCA 2002), rev. granted, 845 So. 2d 889 (Fla. 2003), and is in express and direct conflict with the decision of the First District Court of Appeal in Dream Boat, Inc. v. Department of Revenue, 28 Fla. L. Weekly D837 (Fla. 1st DCA Mar. 27, 2003), review pending, Case No. SC03-637, Florida Supreme Court. See Article V, Section 3(b)(3), Florida Constitution.

## STATEMENT OF THE CASE AND FACTS

Deerbrooke Investments, Inc. (hereinafter "Deerbrooke") is

a Panamanian corporation which operates gaming "cruises to nowhere" from the Port of Palm Beach on the vessel Palm Beach Princess. Deerbrooke, 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 without stopping at any intervening port and without making contact with any foreign jurisdiction. The 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. Deerbrooke, 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 (hereinafter "the Fourth District"). 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 Section 212.08(8), Florida Statutes, and the United States Constitution. Deerbrooke, at ***1-2**.

The Fourth District relied upon its earlier decision in New Sea Escape Cruises, Ltd. v. Florida Department of Revenue, 823

So. 2d 161 (Fla. 4th DCA. 2002), review granted, 845 So. 2d 889 (Fla. 2003)[1] 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 traveled outside Florida waters to total mileage. Deerbrooke, at ***2**. The Fourth District also upheld the Department's proposed assessment of sales and use tax on food purchases for passenger consumption and the rental of real property. Deerbrooke, at ***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 Order of the Fourth District dated November 26, 2003.

## SUMMARY OF THE ARGUMENT

In adhering to its prior decision of New Sea Escape which held that a "cruises to nowhere" was entitled to the partial exemption in Section 212.08(8)(a), Florida Statutes, where the vessel is not engaged in the transport of persons or property in interstate or foreign commerce, the Fourth District misapprehended that this proration (i.e., partial exemption)

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[1]The appeal of the Fourth District's decision in New Sea Escape, Case No. SC02-2013, was argued before the Florida Supreme Court on October 9, 2003.

statute is a tax exemption statute which only applies to vessels engaged in the transport of persons and property in interstate or foreign commerce. The Fourth District in Deerbrooke erred in implicitly finding that a cruise to nowhere was engaged in foreign commerce and thus conflicts with this Court's decision in Tropical, where this Court held, in interpreting the same tax exemption statute at issue here, that the proration statute was properly applied to a vessel engaged in transporting goods in foreign commerce and that tax exemptions are to be narrowly construed against the party claiming them. Tropical, at 435.

A cruise to nowhere is not foreign or interstate commerce. The Fourth District's misapprehension of the legislative intent and plain language of Section 212.08(8) has created express and direct conflict with the case law of this Court and with the First District in Dream Boat wherein it held that Dream Boat's vessel was not engaged in foreign commerce.

## ARGUMENT

### I. THE DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN TROPICAL SHIPPING V. ASKEW, 364 SO. 2D 433 (FLA. 1978) AND OTHERS TO THE SAME EFFECT

The Fourth District's decision is in express and direct conflict with Tropical, where this Court, in interpreting Section 212.08, Florida Statutes, held that courts are obligated

to narrowly construe tax exemption statutes. In Tropical, this Court upheld the constitutionality of Section 212.08, stating:

> In interpreting this statute we are faced with two competing policies. First **we are obligated to narrowly construe tax exemption statutes.** . . . On the other hand, we must construe the statute in accordance with the provisions of the United States Constitution. . . . That is, we may not construe the statute so narrowly as to deny businesses engaged in interstate or foreign commerce their right to be free from undue state interference.

Tropical, at 435 (emphasis added)(citations omitted).

The Fourth District's broad application of the Section 212.08(8)(a) exemption to cruises to nowhere creates an express and direct conflict with the standard of narrow construction established by this Court in Tropical and other cases. See e.g. Anderson, at 399 ("Although taxing statutes are strictly construed against a taxing authority, exemptions are strictly construed against the taxpayer."). See also Volusia County v. Daytona Beach Racing and Recreational Facilities District, 341 So. 2d 498, 502 (Fla. 1976).

Had the Fourth District followed these controlling authorities, it would have reached a different result. Under a narrow interpretation of foreign commerce, as utilized by the Department, Deerbrooke's activities do not constitute foreign commerce and the company's taxes would not be reduced under the foreign commerce exemption. However, the Fourth District

adhered to its prior decision in New Sea Escape where it broadly interpreted the tax exemption in Section 212.08(8) applying it to cases where vessels do not reach, and have no commercial connection with, foreign countries:

> However, in New Sea Escape Cruises, Ltd. v. Florida Department of Revenue, 823 So. 2d 161, 163 (Fla. 4th DCA 2002), rev. granted, 845 So. 2d 889 (Fla. 2003), we recognized that the purpose of the tax according to section 212.05, Florida Statutes, was to tax those conducting business "in this state." Thus, the mileage accrued outside Florida waters during New Sea Escape's cruises to nowhere could not be taxed as "Florida mileage" under section 212.05 and required proration.
>
> We recognize that in New Sea Escape, the taxpayer argued that it was entitled to a partial exemption, whereas Deerbrooke claims a total exemption. Nevertheless, we conclude, applying New Sea Escape, that the lease of gaming equipment for use on board the Princess, along with revenue received from gift shop and photography concessionaires as rent, should be prorated under section 212.08(8).

Deerbrooke, at ***2**.

The Fourth District's continuing misapplication of this Court's standard for interpreting taxing statutes when interpreting the scope of a tax exemption constitutes express and direct conflict with Tropical. As this Court has held, "while doubtful language in taxing statutes should be resolved in favor of the taxpayer, the reverse is applicable in the construction of exceptions and exemptions from taxation." U.S. Gypsum Co. v. Green, 110 So. 2d 409, 413 (Fla. 1959).

As it held in its New Sea Escape decision, the Fourth District's conclusion that "even if Deerbrooke had been in international waters on its cruises to nowhere . . . a vessel that remains in the state's port and profits from daily cruising just outside of the state's territorial waters and back does not interfere with foreign commerce and raises no concern that foreign nations would feel the need to retaliate" applies the **broadest interpretation possible** to Section 212.08(8)(a), Florida Statutes.

## II. THE FOURTH DISTRICT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN DREAM BOAT

The Fourth District has misapprehended the legislative intent and plain language of Section 212.08(8), Florida Statutes, and the points of law established in Dream Boat, Inc. v. Department of Revenue, 28 Fla. L. Weekly D837 (Fla. 1st DCA March 27, 2003), wherein that court held:

> Appellant cannot show its vessels are engaged in interstate or foreign commerce. Therefore we find it unnecessary to reach the question of whether slot machines are "parts thereof" that would qualify for the partial exemption of section 212.08(8)(a). The vessels never enter any other state's waters, and Appellant conceded at oral argument its vessels did not engage in interstate commerce. Thus, the question then becomes whether the vessels transport persons or property in foreign commerce. We find they do not.

Dream Boat, 28 Fla. Law Weekly, at D838. The First District's opinion in Dream Boat expressly certified conflict with New Sea Escape.

Since 1824 foreign commerce has been defined to be ". . . the commercial intercourse between nations, and parts of nations in all its branches." Gibbons v. Ogden, 9 Wheat. 1, 189-190 (1824); Dream Boat; Great Lakes Dredge & Dock Company v. Department of Revenue, 381 So. 2d 1078, 1084 (Fla. 1st DCA 1979). The Fourth District ignored the evidence and findings below which conclusively established that Deerbrooke's vessel was not engaged in foreign commerce except when traveling to a foreign port.

The Fourth District correctly identified the critical core issue as being whether a cruise to nowhere from a Florida port "constitutes purely foreign commerce" or "purely intrastate commerce." Deerbrooke, at ***1**. However, the Fourth District in Deerbrooke misapprehended the law as to proration relying in large part on its prior decision in New Sea Escape and by failing to apply the last sentence of Section 212.08(8), Florida Statutes. As in its prior decision in New Sea Escape, the Fourth District in Deerbrooke did not expressly decide the critical core issue: whether a gambling ship cruise to nowhere is foreign commerce, interstate commerce or intrastate commerce,

leaving that determination for another court or another day.[2] Deerbrooke, at ***2**.

When the Fourth District in Deerbrooke rejected the application of the case of Japan Line, Ltd. v. City of Los Angeles, 441 U.S. 434 (1979), it did not necessarily conclude, as the First District held in Dream Boat, that all of Deerbrooke's Florida-based activities are fully-taxable and the partial exemption of Section 212.08(8), Florida Statutes, does not apply. In holding the transactions involving the lease of gaming equipment used on the vessel and the rent collected from the gift shop and photography concessionaires were eligible for proration under Section 212.08(8), Florida Statutes, the Fourth District in Deerbrooke, improperly shifted the focus from what the vessel was doing to what Deerbrooke was doing on the vessel. Deerbrooke's cruises to nowhere are engaging in purely intrastate commerce.

Purely Florida (i.e., ***intrastate***) transactions are not subject to the partial exemption as there is no possibility or danger of multiple taxation by any other jurisdiction. The

[2]Judge Warner, specially concurring in Deerbrooke, noted agreement with the decision of the First District in Dream Boat, but was constrained by the prior decision of the Fourth District in New Sea Escape. Deerbrooke, at ***3**. Of course, by holding that portions of the tax assessment are subject to proration, the Fourth District implicitly found the cruises to nowhere are foreign commerce.

Department requests that this Court exercise its discretionary jurisdiction, review the decision below and resolve this conflict between the First and Fourth Districts.

## III. THE FOURTH DISTRICT'S OPINION WILL HAVE A DELETERIOUS EFFECT ON FLORIDA LAW

Florida's vast tourism industry has a host of other businesses that on occasion travel outside Florida waters as part of the entertainment provided, such as dinner cruises, tours, yacht and boat rentals, fishing trips, diving and snorkeling cruises. The impact on the State's resources will thus extend not only to the revenues derived from the cruise to nowhere industry, but to numerous other Florida businesses. Though the full extent of the fiscal impact of the decision is unknown, it is estimated that the loss of tax revenues to the state exceeds fifty million dollars a year.

For each of these reasons, the decision below is highly significant to the Department and to the citizens of the State of Florida. Only this Court can address these concerns and clarify the law in this important area.

## CONCLUSION

Respondent, Florida Department of Revenue, respectfully requests that this Court exercise its discretionary jurisdiction to review the decision of the Fourth District Court of Appeal in Deerbrooke Investments, Inc., v. Florida Department of Revenue

and to resolve the conflicts in Florida law created by that important decision.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail to: Kenneth M. Hart, Esquire, Nicole M. Nugan, Esquire, Gunster, Yoakley & Stewart, P.A., 777 South Flagler Drive, Suite 500, East Tower, West Palm Beach, Florida 33401, this 5th day of January, 2004.

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that Respondent's Jurisdictional 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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