The Dangerous Myth of the Three-Twelve Closing

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Many yacht brokers and even some maritime lawyers have used so-called three-twelve closings, ostensibly to avoid liability for Florida sales tax while preserving a yacht's duty-paid or nonexported status. In theory, a three-twelve closing occurs outside Florida waters, but within the US customs territory, that is, within the band of waters located between three "geographic miles" and twelve "nautical miles" from shore. There are at least three problems with the three-twelve closing theory. First, along much of Florida's Atlantic Coast, state waters frequently extend more than three geographic miles from shore, while on Florida's Gulf Coast state waters extend three leagues (or nine nautical miles) from shore. Second, the US customs territory extends only three nautical miles from shore, not twelve nautical miles. And third, merely transferring title in a yacht outside the US customs territory does not necessarily constitute an "exportation" of the yacht, and thus may not result in the loss of duty-paid or non-exported status.

In the United States, most coastal states claim a seaward boundary three geographic miles from their respective Atlantic or Pacific shore, and/or three marine leagues (nine nautical miles) from their Gulf of Mexico shore. The Submerged Lands Act, a federal law passed in 1953, reflects this system of boundaries. The Florida Constitution, however, provides that Florida state waters extend three leagues (nine nautical miles) from shore on the Gulf Coast, and three geographic miles from shore, or to the western edge of the Gulf Stream, whichever distance is greater, on the Atlantic Coast.

It may seem bizarre for a state boundary to be moveable, since the location of the western edge of the Gulf Stream moves, but at least one Florida appellate court has upheld this constitutionally described boundary. In Benson v. Norwegian Cruise Line Ltd., 859 So. 2d 1213 (Fla. 3d DCA 2003), the Third District Court of Appeal, in Miami, applied Florida law to an alleged act of medical malpractice that occurred on a cruise ship almost twelve nautical miles from shore, where the edge of the Gulf Stream was fourteen nautical miles from shore on the pertinent date. Similarly, under state law, Florida's power to impose sales tax extends to the western edge of the Gulf Stream, in many cases considerably more than three geographic miles from shore.

Unlike state waters, the US customs territory extends only three nautical miles from shore. On December 27, 1988, President Ronald Reagan signed a proclamation extending the US territorial seas to twelve nautical miles for international purposes, as allowed under international law. But that proclamation, by its terms, did not affect any existing state or federal law. Although the twelve-mile limit applies for certain international purposes, US Customs has repeatedly ruled that the US customs territory extends only three nautical miles from shore. As a result, closings that take place anywhere more than three nautical miles offshore occur outside of the US customs territory.

Does this mean that yachts delivered more than three nautical miles offshore are being "exported" from the United States and lose their duty-paid status? Not necessarily. The customs regulations define "exportation" as "a severance of goods from the mass of things belonging to

this country with the intention of uniting them to the mass of things belonging to some foreign country." 19 C.F.R. § 101.1. The regulation articulates two essential elements of "exportation": (i) a severance of goods from the mass of things belonging to the United States, and (ii) an intention to unite them to the mass of things belonging to some foreign country. Both elements must exist before there is an "exportation" for customs purposes. The delivery of a yacht outside the US customs territory may constitute a severance of the yacht from the mass of things in this country, which may satisfy the first element of the definition of exportation. But it does not satisfy the second element unless the circumstances demonstrate an intention to unite the yacht to the mass of things belonging to another country.

For example, if a yacht departs from a US port, a closing occurs outside of the US customs territory, and the yacht returns to the same US port without being entered or offered for sale or charter in any foreign country, Customs will probably conclude, absent contrary indications, that there was no intention to unite the yacht to the mass of things in another country, and thus no "exportation," and no loss of duty-paid or non-exported status. On the other hand, if the sale closes outside the US customs territory and the yacht proceeds to a foreign country, or the buyer immediately offers the yacht for sale or charter in a foreign country, it would be much more difficult for the buyer to prove that the buyer did not intend to unite the yacht to the mass of things in that foreign country.

The upshot for buyers is that, if the goal is to avoid Florida sales tax while preserving a yacht's duty-paid status, there is no particular need, from a Customs duty perspective, to close less than twelve nautical miles from shore. For purposes of preserving a yacht's duty-paid or non-exported status, the key is to refrain from doing anything that suggests an intention to unite the yacht to the mass of goods belonging to another country. The yacht should therefore return to a US port immediately after closing and should not be offered for sale or charter in any other country. The most critical thing to remember, however, is that to avoid liability for Florida sales tax, the closing should be more than nine nautical miles offshore, if in the Gulf of Mexico, or if in the Atlantic, more than three geographic miles off the coast, or seaward of the western edge of the Gulf Stream, whichever distance is greater.

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