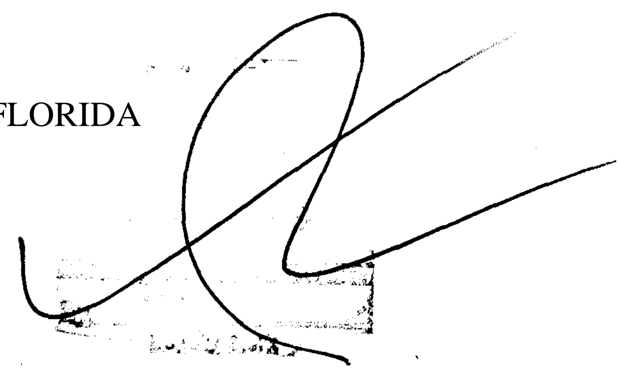
IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,031



PEAT, MARWICK, MITCHELL & CO.,)

Petitioner,)

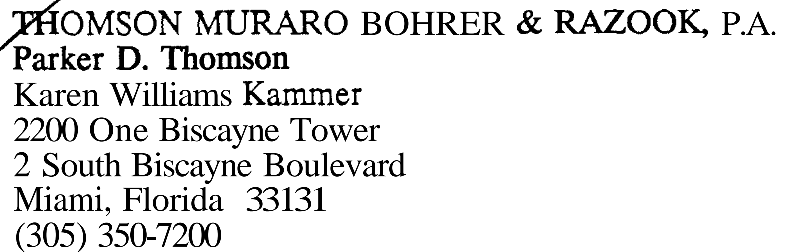
v.)

FRANK A. LANE and CAROL P. LANE,)

Respondents.)

ON DISCRETIONARY REVIEW OF A DECISION OF THE THIRD DISTRICT COURT OF APPEAL CERTIFIED TO BE IN DIRECT CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER PEAT, MARWICK, MITCHELL & CO.



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PREFACE

Peat Marwick adopts the abbreviations and conventions used in its Initial Brief. References to Peat Marwick's Initial Brief will be shown by "Init. Br." followed by the page number, **as** in "Init. Br. at 1." References to Taxpayers' Answer Brief will be shown by "Ans. Br." followed by the page number, as in "Ans. Br. at 1." References to the Appendix of this Reply Brief will be shown by "Reply **A.**" followed by the page number, as in "Reply **A.** at 1."

ARGUMENT

I. UPON RECEIPT OF THE 90-DAY LE'ITER, A TAXPAYER HAS A JUSTICIABLE CLAIM FOR ACCOUNTING NEGLIGENCE -- LEGALLY COGNIZABLE INJURY WHICH THE TAXPAYER SHOULD DISCOVER MAY BE THE RESULT OF ALLEGEDLY ERRONEOUS TAX ADVICE -- AND THEREFORE MUST FILE HIS MALPRACTICE ACTION NO LATER THAN TWO YEARS AFTER RECEMNG THE 90-DAY LE'ITER OR BE FOREVER BARRED FROM DOING SO.

A. Taxpayers Misapprehend The Nature Of The 90-Day Letter And Of The Unique IRS Procedures Triggered By Negligence With Respect To Federal Tax Matters.

A cause of action for accounting malpractice accrues in a taxpayer's favor upon receipt of the 90-Day Letter. A taxpayer can file a malpractice action at that time, having sustained some injury[1/] and having discovered -- or being placed in a position where he should have discovered -- what might have been the cause. See Init. Br. at 19-23. Taxpayers repeatedly assert that no cause of action had accrued in their favor upon receipt of the 90-Day Letter, yet this assertion is founded upon a mischaracterization of that Letter. Ans. Br. at 2 and 9.

[1/] See Init. Br. at 19. The Tax Court has rejected the argument that a taxpayer incurs no legally cognizable injury upon receipt of the 90-Day Letter. In Perkins v. Commissioner, 92 T.C. 377 (1989), Perkins had sent the IRS a portion of the amount of deficiency reflected in the 90-Day Letter the IRS had sent him, and asked the IRS to allocate the payment to the interest which had accrued on the deficiency up to that point. Perkins then claimed the amount paid as an interest deduction on his federal income tax return for that year. The Tax Court found the 90-Day Letter constituted the "assertion of a liability against" a taxpayer, therefore entitling Perkins to claim the deduction for the amount he had sent the IRS. 92 T.C. at 382. The Tax Court flatly rejected the IRS' contention that "no 'existing, unconditional or legally enforceable obligation for the payment of money' " existed as of the 90-Day Letter, even though the IRS could not actually collect the amount of the deficiency until either the 90 days had expired or -- if a petition had been filed in Tax Court -- the Tax Court decision had become final. Id. at 382 and 383. Reply A. at 1-7.

Contrary to Taxpayers' unsupported -- and erroneous -- assertions, there is nothing "preliminary"[2] about the 90-Day Letter. Ans. Br. at 2. The IRS issues the 90-Day Letter after an extensive administrative review process during which the taxpayer has an opportunity to question and negotiate the existence or amount of the deficiency. See Init. Br. at 3-5 and 20. Furthermore, nowhere does the 90-Day Letter, as Taxpayers contend, "acknowledge[] its lack of finality." Ans. Br. at 2. In plain and unmistakable language, the 90-Day Letter: (1) notifies the recipient that the IRS has "determined that there is a deficiency (increase) in your income tax," (2) states the amount of the deficiency and how it was calculated, and (3) describes the process for obtaining a judicial redetermination in Tax Court. Init. Br. at A. 6 - 6c. The taxpayer may avoid IRS collection procedures only by remitting the amount of tax owed, including accrued interest (and penalties, if any), or petitioning for a redetermination of the deficiency in Tax Court within 90 days. If the taxpayer chooses the latter course, the IRS' conclusion as reflected in the 90-Day Letter is presumed correct as a matter of law. Init. Br. at 5, n. 9.

Furthermore, the Secretary of the Treasury may not rescind the 90-Day Letter unilaterally as Taxpayers contend, Ans. Br. at 2, but instead must obtain the taxpayer's consent before doing so.[3] See Init. Br. at A. 14. Nor does rescission eliminate the deficiency: the taxpayer still owes the tax as well as accrued interest and any penalties. In fact, the IRS may issue an identical 90-Day Letter the day after rescission, thus

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[2] **Taxpayers ignore the fact that the IRS does issue a Preliminary Notice of Deficiency --** known **as the 30-Day Letter -- before the 90-Day Letter. The 30-Day Letter advises the taxpayer of a proposed adjustment to his tax return, and is truly preliminary in that the IRS' findings at that point are tentative. See Init. Br. at 4 - 5. The 90-Day Letter and the 30-Day Letter should not be so confused.**

[3] **Section 6212(d) of the Internal Revenue Code provides in pertinent part that "[t]he Secretary may, with the consent of the taxpayer, rescind any notice of deficiency mailed to the taxpayer." I.R.C. §** 6212(d) (1988).

beginning the 90-day period anew.?' Rescission merely affords the taxpayer and the **IRS** the opportunity to settle the dispute administratively without involving the Tax Court.[5/]

Accordingly, once the IRS informed Taxpayers on March 17, 1981, that Taxpayers had underpaid their federal taxes for the years 1976 and 1977 by almost $22,000,[6/] the clock on any malpractice claim against Peat Marwick had begun to run. Upon receiving the 90-Day Letter Taxpayers must have discovered at that time -- or at least should have discovered -- that Peat Marwick might have been negligent with respect to Taxpayers' 1976 and 1977 returns.

B. Beginning The Running Of The Limitations Period Upon Receipt Of The 90-Day Letter, Contrary To The Unsupported Assertions Of Taxpayers, Promotes The Policies Underlying Section 95.11(4)(a), Florida Statutes, And Encourages The Speedy And Efficient Resolution Of Accounting Malpractice Claims.

1. Beginning the running of the limitations period upon receipt of the 90-Day Letter does not result in the filing of premature malpractice claims.

Section 95.1 (4)(a), Florida Statutes, requires a claimant to bring his claim for accounting negligence within two years of the time "the cause of action is discovered or should have been discovered with the exercise of due diligence." (emphasis added). A

[4/] See Init. Br. at 5-6.

[5/] Staff of the Joint Committee on Taxation, 99th Cong., 2d Sess., General Explanation of the Tax Reform Act of 1986, at 1308 (Comm. Print 1986). Reply A. at 8-9. The 90-Day Letter Taxpayers received could not have been rescinded because Section 6212(d) was added by the Tax Reform Act of 1986 and applies to notices of deficiency issued on or after January 1, 1986. Init. Br. at A. 14.

[6/] Taxpayers assert the deficiency was $50,000, but do not cite to the record. Ans. Br. at 1. However, the 90-Day Letter and attachments set forth the deficiency for each year at $9,980 for 1976 and $11,746 for 1977, a total of $21,726. Init. Br. at A. 6 - 6c.

cause of action accrues when the last element constituting the cause of action -- typically the injury -- occurs. § 95.031, Florida Statutes. As of the 90-Day Letter, a taxpayer has a complete cause of action, having sustained legally cognizable injury and having the opportunity to discover what may have been the cause.

Taxpayers ignore the fact that the statute expressly imposes upon the claimant an affirmative obligation to use diligence to discover the existence of his cause of action when surrounding circumstances suggest he be able to do so. See Ans. Br. at 9, 12 and 19-20. The 90-Day Letter can be no clearer in suggesting to the taxpayer that the deficiency and dispute with the IRS may[7] be the result of his accountant's erroneous advice: the 90-Day Letter explicitly informs its recipient that he has underpaid his federal taxes by a specified amount, explains how the IRS reached that conclusion, advises the taxpayer that he either must pay or seek a redetermination in Tax Court, and reminds him that interest will nevertheless continue to accrue until he does pay. Peat Marwick does not argue, as Taxpayers incorrectly state, Ans. Br. at 12, that "receipt of a ninety day letter is tantamount to an announcement to the taxpayer of negligence by his accountant." Ans. Br. at 12.[8] The 90-Day Letter simply puts any prudent individual -- which Taxpayers presumably are -- on notice that he has incurred injury which may have been caused by negligent tax advice. Such good faith belief in the existence of the injury and the alleged negligence which may have caused it is sufficient to enable the taxpayer to bring his suit before a court of law. See Init. Br. at 13 and 15. Taxpayers' protestations that they were

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[7] **As discussed more fully in Peat Marwick's Initial Brief, a claimant need not know with certainty** that **the defendant was negligent. Such a position urged by Taxpayers here would impose an impossible burden on every potential plaintiff -- that is, that he must prove his case before he ever may enter the courthouse door. See generally Init. Br. at 13 and 15.**

[8] **In fact, Peat Marwick denies it was negligent in any way. See R.12-15.**

"in obvious ignorance" of any alleged accounting malpractice, **Ans.** Br. at 17, are absurd. Taxpayers may not hide from the command of the statute of limitations by claiming ignorance when prudence and diligence dictate otherwise.[9/]

Whether Peat Marwick urged Taxpayers to seek a redetermination of the deficiency in Tax **Court,**[10/] Ans. Br. at 10 and 16, is irrelevant to either the injury or the discovery issue. The 90-Day Letter provides both the requisite injury and the discoverable event which together constitute the cause of action. Taxpayers misstate this Court's holding and reasoning in Kellev v. School Board of Seminole County, **435** So.2d 804 (Fla. 1983), which Taxpayers -- presumably inadvertently -- confuse with Kellermever v. Miller, **427** So.2d **343** (Fla. 1st DCA 1983). See Ans. Br. at 16. Taxpayers claim the principle announced in Kelley, a professional negligence action based on a construction defect, is irrelevant to the case before this Court now, because, among other things, the defendant in Kelley had "acknowledged his wrongdoing by undertaking repairs." Ans. Br. at 16. What Taxpayers ignore is that this Court in Kelley rejected the so-called "continuous treatment doctrine" for professional malpractice actions, and just recently affirmed that position in Almand Construction Co.. Inc. v. Evans, **14** F.L.W. 331, 332 (Fla. July **7,** 1989). Under Kelley and Almand, then, a professional's continuing attention to the matter with respect to which he is alleged to have been negligent does not toll the statute of limitations. Taxpayers also argue that the harm complained of in Kelley was "patently obvious." However, just as the leaking roof was sufficient to meet the discovery requirement of the

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9/ See generally Almand Construction Co.. Inc. v. Evans, 14 F.L.W 331, 332 (Fla. July 7, 1989) (with respect to discovery statutes of limitations, claimant may not rely on lack of knowledge to prevent running of limitations period) (Reply A. at 10-12); Kellev v. School Board of Seminole County, 435 So.2d 804, 806 (Fla. 1983).

10/ Taxpayers allege in their Complaint that Peat Marwick encouraged them to contest the IRS' deficiency determination in Tax Court, R.2, an allegation Peat Marwick denies. R.12.

statute in Kelley, so is the 90-Day Letter sufficient to meet the discovery requirement of Section 95.11(4)(a). See discussion of Kelley in Init. Br. at 33-34.

2. Beginning the limitations period at the time of the 90-Day Letter promotes the speedy and efficient resolution of malpractice actions.

Taxpayers repeatedly assert that Peat Marwick is arguing that Taxpayers sue their accountant for malpractice the instant they receive the 90-Day Letter. Ans. Br. at 6, 7 and 14. Instead, as Peat Marwick's Initial Brief makes clear, Peat Marwick argues only that a taxpayer file his malpractice claim within two years after receiving the 90-Day Letter, the period allowed by Section 95.11(4)(a), Florida Statutes. Precisely when within that two-year period the taxpayer elects to file his claim is his decision. To permit the taxpayer to delay bringing any malpractice action for an indeterminate period of time beyond this two-year period, although he knows or should have known earlier that a cause of action had accrued in his favor, contravenes not only the language of Section 95.11(4)(a) but also its spirit. See Init. Br. at 12-16 and 29-30.

Furthermore, Peat Marwick does not urge abatement in every instance, as Taxpayers contend, but merely observes that abatement or a tolling agreement may be an option a claimant may find useful. See Init. Br. at 28 and 45. Taxpayers' leap in logic that seeking abatement of one's claim for accounting malpractice is "an acknowledgment" that such a suit is "premature," Ans. Br. at 7, is unsupported either by law or logic.

II. A CAUSE OF ACTION FOR NEGLIGENCE WITH RESPECT TO FEDERAL TAX MATTERS ACCRUES UPON RECEIPT OF THE 90-DAY LETTER, AT THE LATEST, REGARDLESS OF THE TAXPAYER'S SUBSEQUENT EFFORTS TO MITIGATE THE DAMAGE ALREADY SUSTAINED.

There is simply no merit to Taxpayers' contention that by filing a civil malpractice action and also seeking a deficiency redetermination in Tax Court[11/] a taxpayer presses "mutually exclusive positions." Ans. Br. at 10.[12/] Such a statement evidences a fundamental misunderstanding of the purpose of each proceeding.

A malpractice action focuses on the alleged negligence of the professional: the existence of a duty to the client, whether there was a breach of that duty, and whether such breach caused the client some injury. A Tax Court proceeding by definition cannot be determinative of the negligence issue. The only issue before the Tax Court is the correctness of the IRS' determination that a deficiency in the amount reflected in the 90-Day Letter exists.[13/] Whatever the Tax Court's decision, it does not turn on the conduct or advice of the accountant.?' To characterize, as Taxpayers do, a civil malpractice action

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[11/] Of course, petitioning the Tax Court is but one option a taxpayer can take. Upon receiving the 90-Day Letter, he could pay the deficiency and accrued interest (and penalties, if any), and then institute a refund action in federal district court or in the United States Claims Court. See generally Init. Br. at 6.

[12/] Taxpayers' statement of Rule 4-3.1, Rules Regulating the Florida Bar, 494 So.2d 977,1057 (1986) (Rules of Professional Conduct) (denominated by Taxpayers as "Cannons [sic] of Ethics 4-3.1") is incorrect. Rule 4-3.1 prohibits an attorney from asserting an issue "unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Rule 4-3.1, 494 So.2d at 1057. The Rule does not prohibit the making of alternative claims, as long as one has a good faith basis for doing so. All pleadings, of course, may contain allegations seeking "[r]elief in the alternative." Fla. R. Civ. P. 1.110. In addition, a defendant who asserts a third-party claim necessarily maintains alternative positions: in defending the main action, the defendant argues he is not liable, while simultaneously arguing that the third-party defendant should indemnify him even if he were.

[13/] I.R.C. § 6214 (1988). Init. Br. at A. 20-22.

[14/] Instead, the Tax Court may find that the IRS committed an arithmetic error or that it incorrectly interpreted the Internal Revenue Code. Or, the Tax Court may differ with the IRS on factual issues, for example, what constitutes "reasonable compensation" for taxation purposes.

as a " 'hedge' against an adverse tax court ruling," *Ans.* Br. at 15, implies -- necessarily incorrectly -- that the malpractice action is a substitute for or identical to the Tax Court proceeding.

It categorically cannot be true that, as Taxpayers claim, a Tax Court decision is "directly tied to the propriety of the accountant's actions," *Ans.* Br. at **14,** or, more particularly, that a Tax Court decision adverse to the taxpayer means "the accountant necessarily committed malpractice." *Ans.* Br. at 14. Moreover, Taxpayers ignore the fact that review of the IRS' conclusion does not end with the Tax Court. A taxpayer dissatisfied with the Tax Court decision may appeal to the Court of Appeals and, if necessary, to the Supreme Court of the United States.

Taxpayers also err by declaring that if they had "successfully challenged"[15] the IRS in Tax Court, the claim against Peat Marwick for malpractice "would have disappeared because 1) Peat Marwick's advice would have been proven sound and 2) [Taxpayers] would not have sustained any recoverable damages." *Ans.* Br. at 7 (emphasis added). Again, no 'proof regarding the soundness of an accountant's advice can be had in Tax Court; it simply is not the forum for disposing of that issue. The taxpayer in Tax Court is not "proving that the accountant had not given negligent advice," ***Ans.*** Br. at 11, but instead seeks to prove that the IRS was wrong, either that the deficiency should be reduced or not exist at all. The accountant is not even a party to the proceeding. Moreover, a taxpayer sustains damages (whether or not recoverable) regardless of the Tax court outcome.[16]

15/ Presumably, Taxpayers intend this to mean that the Tax Court reduces the deficiency to zero. However, in this case, Taxpayers and the IRS eventually agreed not to eliminate the deficiency entirely, but rather to reduce the deficiency to approximately $15,000. Init. Br. at 8.

16/ See supra note 1, at 2.

111. THE EXHAUSTION RULE APPLIED BY THE THIRD DISTRICT COURT OF APPEAL, AND THE RULE TAXPAYERS URGE THIS COURT TO ADOPT, IS INAPPLICABLE TO ACTIONS FOR NEGLIGENCE WITH RESPECT TO FEDERAL TAX MATTERS AND CONTRAVENES THE VERY ESSENCE OF FLORIDA'S STATUTE OF LIMITATIONS FOR PROFESSIONAL MALPRACTICE.

As discussed more fully in Peat Marwick's Initial Brief, the exhaustion rule relied upon by the Third District below and which Taxpayers urge this Court to validate is particularly inappropriate to actions for negligence with respect to federal tax matters, regardless of its suitability in any other context. See Init. Br. at 16-30. As a consequence, the cases relied upon by Taxpayers in their Answer Brief and referred to in their Notice of Supplemental Authority are inapposite to the issue before this Court.[17/] See Ans. Br. at 12 - 13, 18 and 21. The cases Taxpayers cite involve legal malpractice and thus do not recognize the uniqueness of the procedures associated with federal tax matters. It is interesting to note that Taxpayers twice cite to the First District's decision in Kellermever v. Miller, 427 So.2d 343 (Fla. 1st DCA 1983), in support of their assertion that Florida's District Courts of Appeal require exhaustion of all avenues of review before a cause of action for professional malpractice can be said to accrue. See Ans. Br. at 13 and 18. However, it does not require a close reading of Kellermever to learn that Kellermeyer did

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[17/] Although Peat Marwick urges this Court to find as a matter of law that the exhaustion rule used -- albeit erroneously -- in many legal malpractice actions to determine when the limitations period begins to run should not apply to malpractice actions with respect to federal tax matters, should this Court nevertheless decide to consider legal and accounting malpractice actions to be similar for limitations purposes, Peat Marwick believes the principle announced by this Court in Edwards v. Ford, 279 So.2d 851 (Fla. 1973), should control. See generally Init. Br. at 30-46.

not so hold.[18] Instead, Kellermever is one legal malpractice decision which properly rejects the exhaustion rule in that context in conformance with this Court's 1973 decision in Edwards v. Ford.[19]

Taxpayers assert there is "no rational basis for creating any distinction between professional malpractice by accountants and professional malpractice by physicians or attorneys." See Ans. Br. at 19. Taxpayers offer no reasoned explanation for such a statement. On the contrary, the unique consequences flowing from alleged negligence with respect to federal tax matters provide that rational basis. Moreover, Taxpayers make the startling suggestion that medical malpractice claims are identical to other kinds of professional negligence so that all should be treated alike for limitations purposes. Ans. Br. at 19. However, Florida, like many jurisdictions, already has recognized that medical malpractice claims are sufficiently distinct so as to warrant separate treatment.[20]

What is most telling is Taxpayers' assertion that the cases Peat Marwick cites are contrary to Florida law and inconsistent with Section 95.11(4)(a). Taxpayers chastise Peat Marwick for directing this Court's attention to decisions from other jurisdictions -- decisions involving accounting malpractice claims and addressing the application of the statute of limitations -- which bear directly on the very issue facing this Court. Ans. Br. at 6 and 19. In a case of first impression, by definition, such decisions are the only available precedent. Nevertheless, Taxpayers carefully select the foreign decisions upon which they

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[18] **The First District in Kellermever held a legal malpractice action barred by the statute of limitations when the client filed his malpractice claim long after he incurred damage and suspected his attorney's negligence may have been the cause. See discussion of Kellermever in Init. Br. at 34 - 35.**

[19] **279 So.2d 851 (Fla. 1973). See supra note 17, at 10.**

[20] **See § 95.11(4)(b), Florida Statutes.**

wish to rely, with many of them not involving alleged professional negligence with respect to federal tax matters.[21/] Taxpayers even go so far as to file a Notice of Supplemental Authority for a purportedly relevant 'recent' decision from an Illinois appellate court in 1980.[22/]

However, the decisions upon which Peat Marwick relies conform to both the letter and the spirit of Section 95.11(4)(a). These jurisdictions adopt the "discovery rule," as does Florida, in that their statutes of limitations run from the time at which the claimant knows or should know that he has a cause of action for professional malpractice. In addition, these decisions concern accounting malpractice, and hold -- without exception --

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21/ See **Ans.** Br. at **21.** Taxpayers' reliance on a **1985** California decision is particularly misplaced. Taxpayers represent to this Court that Day v. Rosenthal, **217** Cal. Rptr. **89** (Cal. Ct. App. **1985),** cert. denied, **475** U.S. **1048 (1986),** requires that Taxpayers here be permitted to maintain their action against Peat Marwick. Ans. Br. at 20. Taxpayers describe this as a lawsuit by a taxpayer against "his accountant," Ans. Br. at 20, but Day concerned various claims asserted by and against Rosenthal, the long-time family attorney for actress Doris Day and her late husband. Day alleged, among other things, that Rosenthal had defrauded her family and rendered negligent advice with respect to a tax shelter investment which eventually led to the IRS issuing a notice of deficiency for unpaid taxes. Taxpayers misread Day, and, as the court there itself acknowledged, that case presented unusually compelling facts. Because the Day family maintained an "unquestioning blind faith in Rosenthal" whose role in Day family affairs was "all consuming," Day, **217** Cal. Rptr. at **115,** the Day family could not be deemed to have discovered it had a cause of action against Rosenthal for malpractice within the meaning of California's statute upon receipt of the notice of deficiency. As the **Day** court correctly stated, an earlier California decision finding the notice of deficiency to be the operative point in time was readily distinguishable, in that, among other things, there was in that case "no undue influence; no concealment." **Day, 217** Cal. Rptr. at **114.** Reply A. at **13-49.** Similarly, with Taxpayers here, there is nothing in the record indicating Peat Marwick exerted any undue influence, concealed any relevant matter, or otherwise acted in any fraudulent manner with respect to Taxpayers.

22/ The case is Bronstein v. Kalcheim & Kalcheim. Ltd., **414** N.E.2d **96 (Ill.** App. Ct. **1980),** a legal malpractice case not involving the limitations issue. There, Bronstein sued his attorney for recommending additional alimony payments to Bronstein's ex-wife on the theory that Bronstein could then deduct that amount on his federal income tax return. Bronstein did and received a notice of deficiency from the IRS. The court declined to address one of Bronstein's issues on appeal -- the alleged negligence of his attorney -- reasoning that Bronstein's suit was "premature" because he had suffered no damages. Bronstein, **414** N.E.2d at **98.** The court offered no justification for this bare assertion, and the cases the court cited which purport to be in support do not concern negligence with respect to federal tax matters. Moreover, the court erred in stating that it is the Tax Court which determines a taxpayer's tax liability. Id. The IRS determines the deficiency while the Tax Court proceeding, by definition, is for a redetermination. See Init. Br. at **21, n.26.**

that a cause of action accrues and thus the limitations period begins to run, at the latest, upon receipt of the 90-Day Letter.[23/] See Init. Br. at 23 - 27.

Taxpayers seek to distinguish Feldman v. Granger, 255 Md. 288,257 A.2d **421** (1969), by suggesting that the act of alleged malpractice in that case was more easily ascertained than the alleged negligence of Peat Marwick. ***Ans.*** Br. at 13 **- 14.** On the contrary, the 90-Day Letter Taxpayers received explicitly notified them the IRS had concluded that they had underpaid their federal taxes by nearly $22,000 because of improperly claimed deductions. In addition, Taxpayers declare -- without explanation -- that the Wyoming Supreme Court's decision in Mills v. Garlow, 768 P.2d **554** (Wyo. 1989), although containing a thoughtful discussion of IRS procedures and other jurisdictions' handling of the issue which this Court has never addressed before now, is "not binding on the Florida courts." *Ans.* Br. at **14.** While decisions such as Mills are not "binding," they are nevertheless persuasive, particularly when they concern the identical issue facing this Court.

[23/] **Not surprisingly, these courts have had no difficulty distinguishing accounting malpractice from** legal **malpractice and concluding that a cause of action for accounting malpractice accrues -- and thus the limitations period begins to** run **-- upon receipt of the 90-Day Letter.**

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Third District Court of Appeal and reinstate the judgment of the Circuit Court granting summary judgment in favor of Peat Marwick.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner Peat, Marwick, Mitchell & Co. was served by mail this 1st day of August, 1989, upon the following:

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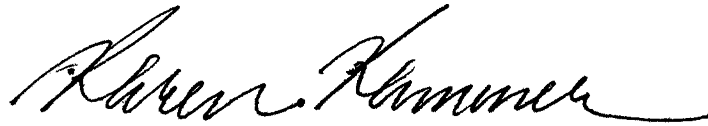

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