OA 1-6-92

FLORIDA SUPREME COURT

CASE NO. 79,024

STATE OF FLORIDA, ROBERT A. BUTTERWORTH, DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, and J. THOMAS HERNDON, in his official capacity as Executive Director of the Department of Revenue of the State of Florida.

FILED
SID J. WHITE
DEC 31 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

Appellants/Cross Appellees,

vs.

LEWIS E. MELAHN, successor in office to LEWIS R. CRIST as Director of Insurance and Receiver of TRANSIT CASUALTY COMPANY,

Appellee/Cross Appellant.

APPELLANTS/CROSS-APPELLEES' REPLY AND ANSWER BRIEF

ROBERT A. BUTTERWORTH, ATTORNEY GENERAL
JOSEPH C. MELLICHAMP, III
FLORIDA DEPARTMENT OF LEGAL AFFAIRS

KATZ, KUTTER, HAIGLER, ALDERMAN, DAVIS,
MARKS & RUTLEDGE, P.A.
First Florida Bank Building
215 S. Monroe Street, Suite 400
Tallahassee, Florida 32301

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES PAGE

OTHER AUTHORITIES PAGE

PRELIMINARY STATEMENT

This brief responds to the arguments made by Appellee/Cross-Appellant, Lewis E. Melahn, who will be referred to as Mr. Melahn. The Appellants/Cross-Appellees will be referred to as "the State."

This brief also responds to the arguments made by the *amicus curiae*, Motors Insurance Company, to the extent that its arguments are founded on the record in this case. The brief of *amicus curiae* is replete with references to and arguments rooted in the record of another case, *Gallagher, et al. v. Motors Insurance Company, et al.*, Case No. 79,061. That case has its own separate briefing schedule. The State will respond to such arguments when presented in that case.

Mr. Melahn does not respond to the arguments made in part III of the State's Initial Brief, at pages 41 through 44 thereof. The State therefore does not further address that issue in this brief.

References to the record in this case are designated "R___." References to the Appendix to the State's Initial Brief are designated "A___."

SUMMARY OF ARGUMENT

The trial court erred in accepting the proposition which Mr. Melahn espouses: that the Equal Protection Clause, of its own force, precludes the State from ever asserting a legitimate interest in different treatment based on the residence of the regulated entity.

That proposition requires the Court to accept the premise that vague and ill-defined notions of federalism under the Equal Protection Clause, notions more legislative than judicial, take precedence over the expressed contrary decision by Congress, uttered in the exercise of its paramount power to protect interests of federalism in relation to commerce. In view of that Congressional decision, Mr. Melahn's proposition threatens a severe imbalance in the allocation of powers under our constitution. Neither *Ward* nor any other case which Mr. Melahn cites requires the Court to adopt that proposition. There are profound constitutional policy reasons to reject it. Under appropriate standards of review, Florida's premium tax is constitutional. The trial court's judgment to the contrary should therefore be reversed.

The trial court was correct in passing upon the validity of the purposes advanced by the State in support of the premium tax and on the rational relationship between those purposes and the challenged tax differential. The trial court correctly held that this tax would pass constitutional inspection under traditional Equal Protection Clause analysis. The trial court erred in its view of *Ward* as calling for a different standard of review.

If the trial court's constitutional determination is not reversed, then its set-off of retaliatory tax should be sustained on well-established grounds of equity. Moreover, its ruling on the applicability of sections 215.26, Florida Statutes (1991) to bar a portion of the tax refund claim should be sustained, although its application of this statute to these facts must be overturned. Further, the trial court's refusal to consider relief operating only from

the date of *Ward* forward should be reversed. Finally, should Mr. Melahn prevail on all points actually determined in the trial court's judgment, this Court should vacate the judgment and remand for consideration of the equitable defenses raised by the State but not resolved by the trial court.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING TRANSIT'S MOTION FOR PARTIAL SUMMARY JUDGMENT; UNDER APPROPRIATE EQUAL PROTECTION CLAUSE ANALYSIS, THE PREMIUM TAX STRUCTURE IS CONSTITUTIONAL.

Mr. Melahn asks the Court to adopt this proposition: "A state cannot assert a legitimate interest in discriminatory taxation based on the residence of the taxed party."[1] He builds all of his arguments upon that foundation. As the State showed in its Initial Brief, however, that foundation is flawed in relation to the business of insurance. It portends a constitutional quagmire, and it ought rightly to be rejected.

By casting that proposition as he does, Mr. Melahn hopes that the Court will ignore the existence of the most critical fact in this case: that the Congress of the United States enacted the McCarran-Ferguson Act and thereby broadly validated the States' powers to distinguish between insurers on the basis of residency for purposes of taxation and regulation. Mr. Melahn hopes that this Court will read the Equal Protection Clause as having the same reach as the Commerce Clause. That conclusion would lead to fundamental

---

[1] Appellee/Cross-Appellant's Answer and Initial Brief, pg. 3.

error and to constitutional blunder. Mr. Melahn hopes that the Court will not perceive the distinction between the proposition he offers for decision and the true proposition for decision here: that the States may distinguish between insurers on the basis of residency where the distinction is rationally related to regulatory concerns regarding the business of insurance, because Congress has expressly validated the legitimacy of such action.

A. The purposes underlying the tax treatment are legitimate. Appellee has failed to demonstrate otherwise, has failed to meet and rebut the State's arguments in that regard, and has not shown why *Ward* should be read expansively.

Mr. Melahn does not rebut the State's arguments; he does not address cases succeeding *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985), cited in the State's Initial Brief, which regard *Ward* as narrowly limited to its facts; he offers no convincing reason to regard *Ward* as supporting his expansive thesis; and he offers no convincing rebuttal of the mischief that an expansive reading of *Ward* would breed.

At pages 10-12 of his brief, Mr. Melahn attempts to distinguish the post-*Ward* decision of *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985). Surprisingly, Mr. Melahn distinguishes *Northeast Bancorp* on the premise that "[I]t should be noted that the Equal Protection Clause only applies once a State admits a foreign corporation within its borders; it does not apply, as in *Northeast Bancorp*, to the State's decision not to allow the corporation inside its borders."[2] The United States

[2] Answer brief of Appellee/Cross-Appellant at page 10.

Supreme Court explicitly held that proposition to be an "anachronism" in *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 657-669 (1981), and receded from the line of cases which established it. Indeed, *Northeast Bancorp*, itself, did not proceed from the premise that the states were unrestrained by the Equal Protection Clause in their power to deny admission to foreign corporations. Instead, *Northeast Bancorp* held that the States' concern with fostering local banking institutions responsive to needs peculiar to local markets was legitimate, and that the statutes were rationally related to achieving that objective. *Northeast Bancorp* employed the quintessential "rational basis" analysis for judging statutes such as the one in challenge here, as the State pointed out in its initial brief.

Equally frail is Mr. Melahn's argument[3] that *Northeast Bancorp* does not govern because it did not involve the taxing power. We are aware of no authority holding that the Equal Protection Clause applies to the exercise of some state powers but not to others. It seems specious to assert that the Equal Protection Clause allows the States to forbid non-resident corporations to engage in local banking, as was the case in *Northeast Bancorp*, but prevents the States from taking less drastic steps, such as creating an inducement to domesticate, in another fundamentally important industry, an inducement which this record shows, and the trial court found, to advance legitimate interests in relation to the State's regulation of the business of insurance.

---

[3] See page 10 of Appellee's/Cross-Appellant's answer and initial brief.

Mr. Melahn unconvincingly attempts to distinguish this case from *Northeast Bancorp* by asserting that Congress has never expressed a policy determination in favor of prohibiting large interstate insurance firms. That assertion is baffling. Nothing in the challenged statutes is designed to prohibit the formation of large interstate insurance firms. What the challenged tax structure does, as shown by the record, is to encourage the formation of domestic insurers, or domestic subsidiaries of foreign insurers, so that the State's overall regulatory influence over the insurance industry serving this State is thereby increased. The power of the State to make that policy choice, unfettered by countervailing principles of federalism, was unequivocally affirmed by Congress through the McCarran-Ferguson Act. *See* HR Rep. No. 143, 79th Cong., 1st Sess., 2 (1945); *see also Western and Southern Life Ins. Co., supra* at 654; *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 427-428 (1946)[4] (higher premium tax on foreign insurers does not violate Commerce Clause).

Moreover we note that Mr. Melahn does not even address, much less purport to distinguish, other federal cases subsequent to *Ward* which have held it to be a limited and non-dispositive decision. *See Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916

---

[4] "First, it follows from what has been said that we are not required to determine whether South Carolina's tax would be valid in the dormancy of Congress' power. For Congress has expressly stated its intent and policy in the Act. And, for reasons to be stated, we think that the declaration's effect is clearly to sustain the exaction and that this can be done without violating any constitutional provision." *Id.*

F.2d 903 (3rd Cir. 1990), *cert. denied* 111 S.Ct. 2814 (1991); *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987).[5]

Mr. Melahn purports to distinguish *Madden v. Kentucky*, 390 U.S. 83 (1940) and *Board of Ed. v. Illinois*, 203 U.S. 553 (1906) as not concerning discriminatory treatment of foreign residents, but rather discriminatory treatment of residents' property, when either placed in the possession of or given to a nonresident. That distinction is superficial. In both *Madden v. Kentucky* and *Board of Ed. v. Illinois* the effect of the discrimination was directed to and felt by the non-resident businesses. Yet, in neither case was the Equal Protection Clause offended because the distinctions in treatment were rationally related to state interests beyond the mere fact of foreign residency.

Mr. Melahn's purported distinction of *International Organization of Masters, Mates & Pilots v. Andrew* [6] is likewise superficial. He asserts that the Equal Protection Clause does not apply where the state is acting as a "market participant" as opposed to a "market regulator." As we noted above, we are aware of no case holding that the Equal Protection Clause applies to the exercise of some state powers, but not to all state powers. Moreover, the state in that case imposed the challenged pay differential on a transportation company, and thus was, in Mr. Melahn's lexicon, a "market regulator."

---

[5] Each of these cases is analyzed and discussed at pages 23-24 of the State's Initial Brief. Yet Mr. Melahn disregards them.

[6] 626 F.Sup. 1271 (D. Alaska 1986), *aff'd. in part, vacated in part under other grounds*, 831 F.2d 843 (9th Cir. 1987), *cert. denied*, 485 U.S. 962 (1988).

Finally, Mr. Melahn asserts that the State's argument here was rejected in *Ward*. Mr. Melahn misstates the State's position. The State does not argue that the Equal Protection Clause can never prohibit residence-sensitive distinctions simply because the Congress has removed that limitation from the States under the Commerce Clause. The State argues, instead, that since Congress, in the exercise of its paramount authority to promote and protect federalism in the Union, has sanctioned the States' residency distinctions in tax and regulatory treatment of insurers, the proposition for which Mr. Melahn argues *Ward* to stand cannot be sustained.[7] The State's position is that, since the tax structure in question is

---

[7] Mr. Melahn asserts: "A state cannot assert a legitimate interest in discriminatory taxation based on the residence of the taxed party." Appellee/Cross-Appellant's Answer and Initial Brief, pg. 3. He thus asserts that *Ward* must be read as adopting the proposition that the Equal Protection Clause incorporates notions of federalism similar to those underlying the Commerce Clause and that those ill-defined "notions of federalism" mandate that a state may never legitimately distinguish between non-residents and residents. That view is fundamentally marred. First, if that were the view adopted in *Ward*, there would have been no occasion for the court to remand for consideration of other regulatory purposes offered by Alabama for its tax, as none would have sufficed to overcome such federalism components of the Equal Protection Clause. Second, those same notions of federalism would have invalidated the regulations which the court upheld in *Northeast Bancorp. v. Board of Governors of the Fed. Reserve System, supra*. Third, the Congress, being vested by the Commerce Clause with paramount authority over concerns of federalism related to interstate commerce, has expressly empowered the States to act as Florida did in relation to foreign insurers. That blessing removes any leeway to assert that notions of federalism from other contexts have any place in relation to the States' powers over the business of insurance. Fourth, Mr. Justice Brennan, the proponent of the view that the Equal Protection Clause somehow incorporates notions of federalism, *see Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1954) (Brennan, J., concurring), (a view, incidentally, which has never been adopted by a majority of the court) dissented from the *Ward* opinion.

For the same reasons, Mr. Melahn's reliance on this Court's decision in *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343 (1978), is misplaced. That case did not involve the exercise of the State's taxing power over the business of insurance, and, therefore, did

indisputably related to objectives sanctioned by Congress, the Courts should not substitute their view for that of Congress based on nebulous and ill-defined "notions of federalism" under the guise of Equal Protection Clause analysis. *Ward* did not do so; it should not be expanded to do so.

B. State court decisions upon which Mr. Melahn relies are not on point.

At pages 12-15 of his answer and initial brief, Mr. Melahn argues from several reported[8] decisions of other state courts. The State analyzed each of those decisions in its initial brief at pages 25-27. Mr. Melahn does not rebut the State's analysis of those cases. The State therefore does not reiterate here its analysis of those cases, but respectfully refers the Court to pages 25-27 of its initial brief.

---

not address the effect of the Congress' policy declaration in the McCarran-Ferguson Act. Moreover, that case purported to follow Mr. Justice Brennan's view that the Equal Protection Clause incorporated notions of federalism, a view which, as we have noted, has never been adopted by a majority of the United States Supreme Court, and from which Mr. Justice Brennan himself receded in the specific context of the business of insurance. Moreover, *AMREP* was another in that line of cases where the States imposed higher property taxes on non-residents, with no apparent or enunciated regulatory basis for doing so. *See* discussion in the State's Initial Brief at pgs. 17-18. Thus, while the result in that case was correct, it is inapplicable here.

[8] Mr. Melahn purports to rely upon *Principal Mutual Life Insurance Company v. Taylor*, an unreported Arkansas trial court decision, and *Keystone Provident Life Insurance Company v. Remil*, an unreported opinion of the Hawaii courts. Mr. Melahn does not favor either the court or opposing counsel with a complete discussion of the holdings in those cases or a copy of the opinions.

II. THE TRIAL COURT PROPERLY CONSIDERED ALL PLAUSIBLE PURPOSES ADVANCED AND DID NOT ERR IN MAKING FACTUAL FINDINGS REGARDING THE STATE'S PURPOSES.

A. The articulation of some purposes for the statute by one legislative session does not preclude traditional Equal Protection Clause analysis: The statute is to be upheld if any conceivable and plausible purpose can be said in fair debate to be advanced by the statute.

Review of these statutes under the Equal Protection Clause is governed by the rational basis test. Neither *Ward*, nor any other decision argued by Mr. Melahn, supports any other standard of review. To pass muster under that test, the statutes' classification need only be supported by a showing of conceivable legitimate objectives and a showing that one may rationally conclude that the classification would foster one or more of those objectives. *E.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization of California, supra.*

Mr. Melahn can draw no support for a different standard of review from the decision in *Allied Stores Of Ohio, Inc. v. Bowers*, 358 U.S. 522 (1959). In the course of the *Allied Stores* opinion, the Court referred an earlier decision, *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949), and observed that the tax statute reviewed in *Wheeling* declared its purpose, leaving no room to conceive of any other purpose for the statute. The statute in *Wheeling*, however, was of a different sort from Florida's premium tax statute. As we noted in our initial brief, *Wheeling* involved an ad valorem tax, a tax on the value of property owned. There was no support, either in the purposes expressed by the State or in the statute's text itself, for concluding that a purpose other than exporting ad valorem tax burdens could have

underlayed the statute, or the that the difference in tax treatment conformed with any regulatory goal. The statute's sole conceivable purpose, as well as its avowed purpose, was to export the burden of the property tax. Indeed, since the burden of property ownership on the state is the same, regardless of who owns the property, there could have been no other conceivable purpose for the tax structure under review in *Wheeling*. Such was *Wheeling's* holding. *Wheeling* itself noted that it was limited to the arena of ad valorem taxation, and recognized that the Equal Protection Clause may not prevent a residency-based difference in tax treatment in situations where a dissimilarity exists in the state's relationship to classes of taxpayers. *Wheeling, supra*, at 571-573.

The manner in which the *Allied Stores* opinion treated *Wheeling* was unnecessary to the decision in *Allied Stores*, and therefore *obiter dictum*, because the tax at issue in *Allied Stores* did not rest solely upon residence, but was based upon a reasoned distinction in state policy.

In contrast to the legislation reviewed in *Wheeling*, the Florida legislature, enacting the premium tax differential as long ago as 1925, *See Ch. 10150, Laws of Fla.* (1925), did not expressly articulate objectives. The 1982 legislature articulated *some* non-revenue objectives of the tax structure. The tax structure, however, is not of the type considered in *Wheeling*, which on its face could never support the inference of any purpose other than to export tax burdens.

Unlike the case presented in *Wheeling*, it is unsound to speculate here that the objectives articulated by a single legislative session necessarily encompass all goals which preceding legislatures, from 1925 on, may have had in mind. The challenged tax statutes incorporate, and therefore must be read *in pari materia* with, Section 628.271, Florida Statutes (1987). Read together, the text of these statutes clearly manifests the regulatory goals asserted by the State defendants in this case.

Moreover, the 1988 legislature recognized the importance of such regulatory goals. *See Ch. 88-206, Laws of Fla.* Thus if, as Appellee contends, the Court must consider the goals expressed by the 1982 legislature regarding the business of insurance, it must likewise consider the policy goals voiced by 1988 legislature. It is equally as probable that legislatures preceding the 1982 session regarded the tax structure as implicating policy considerations akin to those expressed in 1988, as it is that earlier legislatures contemplated only the objectives voiced by the 1982 session.

Most fundamentally, it is illogical, and would be poor constitutional policy, to construct a more onerous standard of rational-basis review in a case where one legislative session articulates some purposes for a long-standing statute than in a case where none are expressly voiced. When the courts address the construction of a statute, they look for guidance in what the legislature expressly has said; a form of deference that the judicial branch owes to the legislature. However, judicial thought under the Equal Protection Clause posits a different sort of deference when the question is a statute's constitutionality. The test

historically in that circumstance has been: Could the legislature rationally have believed, on a fairly debatable standard, that any reasonable purpose was advanced?

The policy reason for those two lines of cases is the same: the deference owed by the judiciary to the legislative branch under the doctrine of the separation of powers. When a party challenges that statute, that duty of deference, as the courts have historically recognized, requires the courts to look to any plausible purpose which may fairly said to be advanced by the challenged statute.

Therefore, the traditional (and current) test under the Equal Protection Clause is fully applicable here[9]: Since the regulatory objectives for the tax structure asserted below by the State can not only be readily conceived, but are readily ascertained from reading sections 624.509-624.514 and 628.271, Florida Statutes (1987) *in pari materia*, those purposes must

---

[9] Mr. Melahn improperly relies on *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) and *Zobel v. Williams*, 457 U.S. 55 (1982) in his search for authority to support a more rigorous standard of review. *Weinberger* reviewed a gender-based statutory distinction, as to which a heightened standard of scrutiny is employed under the Equal Protection Clause. *E.g., City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-441 (1985). Moreover, that case was decided on a overbreadth analysis under the Due Process Clause of the Fifth Amendment to the United States Constitution. Such is not the case at bar. The opinion in *Zobel*, upon which Mr. Melahn relies, is a plurality opinion. Five of the Justices regarded the Alaska statute there in question as breaching the citizens' right of travel, finding that right to be a fundamental one. A strict-scrutiny analysis is applied under the Equal Protection Clause where fundamental rights are implicated. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 253-255 (1974). Again, such is not the case at bar. Further, Justice Brennan, who was in concurrence in *Zobel* and in dissent in *Ward*, speaking for four justices in *Zobel*, said: "....discrimination on the basis of residence must be supported by a valid state interest independent of the discrimination itself." *Zobel, supra*, at 69 (emphasis added). Such an independent and valid state interest is exactly what exists in this case.

be ascribed to the challenged laws. *See, e.g., Eastern Air Lines, Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984).

Mr. Melahn's reliance on *Kassel v. Consolidated Freight Ways Corp. of Delaware*, 450 U.S. 662 (1981) is equally untenable. Mr. Melahn concedes at page 18 of his brief that *Kassel* is a case decided upon the Commerce Clause principles, not under the Equal Protection Clause. Statutes challenged under the Commerce Clause are subject to a different, more rigorous standard of scrutiny. The courts routinely engage in the process of attempting to ascertain the "true" purposes of the legislature in judging a statute under the Commerce Clause. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 104 S.Ct. 3049 (1984). In the case of the business of insurance, however, the rigors of Commerce Clause scrutiny have been expressly removed by the McCarran-Ferguson Act, 15 U.S.C. § 1011, *et seq.*

B. The trial court was correct in concluding that these statutes met the rational basis test.

The trial court's finding that the purposes asserted by the State are legitimate is not contrary to sound judicial precedent.

Mr. Melahn asserts that the State's purposes for the statute are pretextual. A perusal of Sections 624.509, 624.512, 624.514, 628.271, Florida Statutes (1987) shows that argument to be demonstrably fallacious. Not only are the regulatory objectives espoused by the State in this case readily apparent from the text of those statutes themselves, but Mr. Melahn and his insurance regulatory expert both agreed that the goal of increasing the State's regulatory

influence and control over insurers operating within the State's borders is legitimate from their vantage point as insurance regulators. They also conceded that the State has more regulatory influence and control, comparatively speaking, in relation to a domestically-organized insurer than it has in respect to a foreign insurer doing business within the State's borders (A547-548, deposition of Lewis Melahn, pgs. 100-101, August 13, 1991; A778-817, A818, A822, A823, A825, deposition of Thomas Bond, pgs. 32-71, 72, 76, 77, 79, October 10, 1991; A913-915, deposition of Lewis Melahn, October 9, 1991).

Mr. Melahn unconvincingly asserts that cases from other states (analyzed at pages 25-27 of the State's Initial Brief) dealt with the same purposes set forth by the State of Florida in this case. A perusal of those cases, however, shows Mr. Melahn's analysis to be wrong. None of those cases presented the legitimacy of the purposes here asserted by Florida for decision.

C. The trial court did not err in deciding this case upon motions for summary judgment.

A party may not ask for summary judgment and assert that there is no genuine issue of material fact on a specific question and then, on appeal, take the contrary position that there was a material issue of fact in dispute on the same question. *Scavella v. School Bd. of Dade County*, 363 So.2d 1095, 1099 (Fla. 1978); *Wilson v. Milligan*, 147 So.2d 618, 622 (Fla. 2d DCA 1962). Here, the specific question upon which both parties moved for summary judgment was that of the validity of the State's purposes for the challenged statues under the

Equal Protection Clause. Mr. Melahn was the successful movant on that specific question below. He cannot now assert that the trial court erred in resolving that issue on summary judgment.

Moreover, it is clear that the trial court did not err in ruling upon the legitimacy of the purposes offered by the State and the rational relationship between those purposes and the taxing structure in question.

Mr. Melahn overlooks the crucial point that this is an Equal Protection Clause case, a case where the governing standard of review is merely whether it is fairly debatable that legitimate State purposes would be advanced by the tax structure challenged. The question of the legitimacy of State purposes is a legal conclusion for the Court, not admitting of genuine factual disputes. *See, e.g., Western & Southern Life Insurance Co. v. State Bd. of Equalization, supra*; *Frazier v. Manson*, 703 F.2d 30 (2d Cir. 1983), *cert. denied* 104 S.Ct. 339 (1983); *Sasso v. RAM Property Mgt.*, 431 So.2d 204 (Fla. lst DCA 1983), *aff'd* 452 So.2d 932 (Fla. 1984). Moreover Mr. Melahn and his own insurance expert agreed upon the legitimacy of at least one of the purposes advanced by Florida in defense of these statutes. (A547-548, deposition of Lewis Melahn, pgs. 100-101, August 13, 1991; A778-817, A818, A822, A823, A825, deposition of Thomas Bond, October 10, 1991; A913-915, deposition of Lewis Melahn, pgs. 32-71, 72, 76, 77, 79, October 9, 1991).

Further Mr. Melahn and his insurance regulatory expert both conceded that Florida has a greater degree of regulatory control, comparatively, in relation to a domestic insurance

company than in relation to a foreign insurance company doing business in the State. (A547-548, deposition of Lewis Melahn, pgs. 100-101, August 13, 1991; A778-817, A818, A822, A823, A825, deposition of Thomas Bond, pgs. 32-71, 72, 76, 77, 79, October 10, 1991; A913-915, deposition of Lewis Melahn, pgs. 155-157, October 9, 1991).

Finally, Mr. Melahn's witness agreed that tax structures such as the one Mr. Melahn is now challenging would indeed have the effect of inducing the formation of domestic insurers (A800-801, deposition of Thomas Bond, pgs. 54-55, October 10, 1991), which would subject them to Florida's undiluted regulatory power. Mr. Melahn thus adduced nothing which would create a genuine dispute of material fact under the governing standard of review. He adduced nothing to counter the State's evidence that the tax structure in question would, and in fact did, encourage the formation of domestic insurance companies in the State of Florida, which would subject them to the State's maximum, or plenary, control.

Mr. Melahn argues at page 23 of his brief that the existence of Florida's retaliatory tax and the retaliatory taxes of other states would equalize the effect of Florida's domestic premium tax reduction and would therefore nullify any incentive to domesticate in Florida provided by the premium tax differential. That argument is astonishing. Mr. Melahn's own expert witness testified that the operation of the retaliatory tax does not depend upon, nor relate to, the level of taxation of domestic insurance companies within the state, but only to the comparative level of taxation of foreign insurance companies in two or more states

(A804, deposition of Thomas Bond, pg. 58, October 10, 1991). Mr. Bond, Mr. Melahn's insurance regulatory expert, also testified that, as between states with similar levels of taxation of foreign insurance companies, an insurer domiciled in a state which offers a domestic premium tax exemption would indeed experience an overall tax savings (A802-813, deposition of Thomas Bond, pgs. 56-67, October 10, 1991), thus creating an inducement to domesticate.

Mr. Melahn argues that Mr. Bond and Mr. Melahn both set up material disputes of fact as to the "legitimacy" of the State's purposes. *See* pages 23-24 of Mr. Melahn's brief. As we noted above, however, the question of legitimacy of the State's purposes is a question of law, not one of fact. That determination is a judicial one, which the trial court was entitled to make. As noted above, Mr. Bond and Mr. Melahn both offered testimony which supported the trial court's determination of the legitimacy of at least one of Florida's asserted purposes.

Mr. Melahn attempts to characterize this record as containing a material <u>factual</u> dispute regarding whether the power of liquidation and rehabilitation comprises a part of insurance regulation. *See* pages 24-25 of Mr. Melahn's brief. That attempt likewise fails to withstand scrutiny. Mr. Melahn conceded that the regulation of insurance is a concept broad enough to encompass the power to rehabilitate or liquidate an insurer. (A863-864, deposition of Thomas Bond, pgs. 117-118, October 10, 1991; A915, deposition of Lewis Melahn, pg. 157, October 9, 1991). He conceded that only the insurer's state of domicile has the power

to institute such *in rem* proceedings. (A778-783, A823, deposition of Thomas Bond, pgs. 32-37, 77, October 10, 1991; A913-914, deposition of Lewis Melahn, pgs. 155-156, October 9, 1991). He conceded that the exclusive right of the domiciliary state to take such action vests that state with a greater degree of regulatory influence over the insurer than other states enjoy. (A542-544, deposition of Lewis Melahn, pgs. 95-97, August 13, 1991; A824-825, A827-830, deposition of Thomas Bond, pgs. 78-79, 81-84, October 10, 1991). Given that testimony, and given that Florida law classifies the power to rehabilitate or liquidate as part and parcel of insurance regulation, *see Ch. 631, Fla. Stat. (1991)*, it is a legal question as to whether those powers compose a part of insurance regulation. The legislature has answered that question in the affirmative. There is no genuine dispute over the matter.

Mr. Melahn's arguments at pages 25-26 of his brief clearly go to the wisdom and utility of the statutes, a consideration which is patently irrelevant in Equal Protection Clause review. *See, e.g., Western & Southern Life Ins. Co. v. State Bd. of Equalization of California, supra*. Therefore there was no dispute of material fact, as the trial court correctly determined in its judgment.

III. THE TRIAL COURT ERRED IN GIVING FULL RETROACTIVE EFFECT TO ITS DECLARATION OF THE INVALIDITY OF THE PREMIUM TAX.

Mr. Melahn argues at pages 26-29 of his brief that the law requires full retroactive relief (which he translates to mean a refund of taxes paid back to 1980), rather than a declaration of invalidity only from the date of the *Ward* decision forward. He supports that

assertion with several cases which were subsumed in and clarified by *McKesson Corp. v. Division of Alcoholic Bev. & Tobacco*, __ U.S. __, 110 S.Ct. 2238 (1990) and *American Trucking Ass'n. v. Smith*, __ U.S. __, 110 S.Ct. 2323 (1990). He misunderstands both *McKesson* and *Smith*. While *McKesson* held that retrospective relief was mandated on the facts of that case, it did not hold that it is mandated in every case, or that it must be composed of a full refund of the tax challenged. *McKesson* is more fully discussed at pages 24-29 of this brief. That discussion need not be repeated here. *Smith* held that full retroactivity was not required, and affirmed the lower court's decision to limit refunds to those taxes paid after the date of an earlier decision on the basis of principles set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). That is precisely the shape of relief appropriate here, if the premium tax is unconstitutional, for the reasons discussed at pages 37-41 of the State's Initial Brief.

Moreover, Mr. Melahn does not cite or discuss a later decision, *James B. Beam Distilling Co. v. Georgia*, __ U.S. __, 111 S.Ct. 2439 (1991) (discussd further, *infra*). *Beam* noted that *McKesson* does not address the question of remedy and is not dispositive on the issue of whether *Chevron Oil* reliance interests justify a remedy of a nature other than full retroactivity. *Id.* at 2448.

IV. THE TRIAL COURT CORRECTLY GRANTED THE STATE'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE NON-CLAIM ISSUE UNDER SECTION 215.26, FLORIDA STATUTES.

The State's First Affirmative Defense below was that Mr. Melahn is barred by section 215.26, Florida Statutes (1991), from claiming a refund as to taxes paid more than three years before the date of refund application. Mr. Melahn filed Transit Casualty Co.'s refund application on February 26, 1988. Section 215.26, Florida Statutes, provides in pertinent part:

> (2) Application for refunds as provided by this section shall be filed with the Comptroller.... within 3 years after the right to such refund shall have accrued *else such right shall be barred.* [emphasis supplied]

Transit made certain premium tax payments within the non-claim period (April 17, 1985; July 22, 1985; and October 15, 1985, and March 1, 1985). All other taxes for which Mr. Melahn seeks a refund were paid more than three years before the filing of the application for refund.

Section 215.26, Florida Statutes, is unequivocally a statute of non-claim, which extinguishes the right to a refund if application for a refund is not filed within three years from the date the right to refund accrues. The right to refund *accrues* under section 215.26 on the *date of payment* of tax. If a refund application is not filed within three years of the date of payment, the right of refund as to such taxes is barred. In *State, ex rel. Victor*

Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954) this Court considered the same argument which Mr. Melahn raises here. The taxpayer asserted that his right to refund did not accrue until the unconstitutionality of the taxing statute had been determined, and, therefore, that he could maintain an action for refund of tax paid under an unconstitutional statute even though he had not filed his application for refund within the period allowed by section 215.26. The Court opined:

> In dealing with statutes such as that involved in this case it is essential that we bear in mind that unless there is some statute which authorizes a refund or the filing of the claim for refund, money can not be refunded or recovered once it has been paid *although levied under the authority of a unconstitutional statute* . . . .
>
> *In short, it is the universal rule that a statute of non-claim runs from the time the taxes are paid and is not postponed until the legality of the tax has been judicially determined.*

Id. at 562 [emphasis supplied]. Discussing prior cases, the Court held it to be established "that the right to a refund of taxes illegally paid accrued when the taxes were paid." *Id.* at 563-564. *Accord, State, ex. rel Tampa Electric Company v. Gay*, 40 So.2d 225, 227 (Fla. 1949). The Court rejected the taxpayer's argument that he could not have filed a refund claim within the period required by section 215.26 because he did not have such a right until the statute was held invalid. *State, ex rel. Victor Chemical Works vs. Gay, supra*, at 564-565.

In light of the clear exposition in *State, ex rel. Victor Chemical Works*, Mr. Melahn's arguments cannot prevail. None of the cases he relies on are on point. Each dealt with

section 194.171, Florida Statutes, which limits taxpayer challenges to local property tax valuations.[10] Section 194.171 was previously unclear as to whether it was merely a statute of limitation or was, instead, a statute of non-claim. The distinction between a "void" assessment of tax and a "voidable" assessment, upon which Mr. Melahn hangs his argument, has no meaning in reference to a non-claim statute. That dichotomy has meaning only in the context of statutes of limitation. The courts previously adopted inconsistent views as to whether section 194.171, Florida Statutes, was a non-claim statute or merely a statute of limitation. That divergence of opinion accounts for the discussions of the "void/voidable" dichotomy in those cases.

We note that the legislature has since settled the debate over section 194.171, Florida Statutes, by clearly casting it as a statute of non-claim. *Ch. 83-204, Laws of Fla.* This Court noted the legislature's action in *Markham v. Neptune Hollywood Beach Club*, 527 So.2d 814 (Fla. 1988), concluding that the "void/voidable" distinction discussed in previous cases addressing section 194.71, Florida Statutes, no longer had significance. *Markham* reversed the lower court, which had held that a taxpayer's action based upon a challenge to an ad valorem tax statute was a challenge to a "void" assessment and therefore could be brought outside of the time allotted under section 194.171. *Markham* held that, even where the

---

[10] The exception is *Grunwald v. Department of Revenue*, 343 So.2d 1973 (Fla. lst DCA 1977) which simply says, "The right to a refund for intangible taxes is available for a period of three years from the date of payment." *Id.* at 974. The State is perplexed as to how Mr. Melahn construes the case as referring to section 215.26 as a statute of limitation.

taxpayer's challenge is to the constitutionality of the taxing statute, it is barred, if not filed within the non-claim period of amended section 194.171.

Section 215.26, Florida Statutes, unlike section 194.171, has consistently been held to be a statute of non-claim, thus barring a claim for refund, even one premised on a constitutional challenge to the taxing statute, as to taxes paid more than three years before filing of an application for refund. Therefore the "void/voidable" distinction which is the linchpin of Mr. Melahn's argument is completely inapposite here.

Mr. Melahn's reliance on *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco, supra*, is likewise unavailing. In that case, the Court characterized section 215.26, Florida Statutes, as a statute of limitation. *See McKesson, supra,* at 2254, n. 28. The timeliness of the taxpayer's suit under section 215.26 was not in issue in *McKesson*. That characterization is therefore *obiter dictum*. Notwithstanding that dictum, the nature of section 215.26 is a matter of state law, not federal law. *See James B. Beam Distilling Co. v. Georgia, supra*, at 2445. This Court's opinion in *State, ex rel. Victor Chemical Works v. Gay, supra*, governs the point. The *Gay* opinion makes it clear that section 215.26, is a statute of non-claim, under which the right of refund accrues when the tax is paid.[11]

---

[11] Moreover, *McKesson* affirms that the States are free to impose "relatively short" statutes of repose on taxpayer refund actions even in cases where the taxpayer complains that the tax is unconstitutional. *McKesson*, at 2254. *See also Montagino v. Canale*, 792 F.2d 554, 556-558 (5th Cir. 1986) (3-year statute of repose for medical malpractice claims does not offend procedural or substantive due process requirements). *See generally Bystrom v. Diaz*, 514 So.2d 1072, 1075 (Fla. 1987).

In sum, Appellee's right to a refund of taxes paid prior to February 26, 1985 clearly is extinguished, since Appellee did not file an application for refund until February 26, 1988.

V. THE TRIAL COURT CORRECTLY REQUIRED APPELLEE TO DO EQUITY, REDUCING HIS REFUND DEMAND BY THE AMOUNT OF RETALIATORY TAX TRANSIT WOULD HAVE BEEN OBLIGATED TO PAY DURING THE REFUND PERIOD HAD IT NOT BEEN REQUIRED TO PAY PREMIUM TAX.

At a minimum,[12] the trial court acted correctly to shape its decree such that Mr. Melahn does not achieve an inequitable result. The court required that his premium tax refund demand be reduced by the amount of another tax [the "retaliatory" tax imposed by section 624.429 Florida Statutes (1987)] which Transit would have been obligated to pay in the event that it had owed less premium tax to Florida than it actually paid.

The cause of action for a tax refund sounds in mandamus, and is governed by equitable principles. *State, ex rel. Mann v. Burns*, 109 So.2d 195 (Fla. lst DCA 1959); *Ramsey v. Lovett*, 89 So.2d 669 (Fla. 1956). *See also Shevin v. Public Service Comm'n.*, 333 So.2d 9 (Fla. 1976). When the equities of this case are considered, it is clear that the trial court acted correctly in setting off retaliatory taxes otherwise due against Mr. Melahn's premium tax refund demand on behalf of Transit.

---

[12] The trial court declined to rule on the State's defenses of laches and estoppel. (A1354; R920) Should the Court affirm the trial court on its constitutional determination, but reverse on the set-off of otherwise-due retaliatory tax, the Court should remand with instructions to consider the defenses of estoppel and laches. As discussed in text *infra* at pgs. 32-34, those defenses are legally sufficient and must be heard, if the Court rules in this manner.

A. Transit had an action, before and at the time of payment of the premium tax, to challenge the constitutionality thereof.

A taxpayer has an action in mandamus at the moment that taxes are paid by which he may simultaneously challenge the constitutionality of the statute under which the tax is levied and seek a refund of taxes paid. *State, ex rel. Victor Chemical Works v. Gay, supra*. Moreover, Transit need not have waited until the payments were due to challenge the statute. Under Chapter 86, Florida Statutes, Transit had an anticipatory action available at all times. *E.g., Sheldon v. Powell*, 128 So. 258, 263 (Fla. 1930). *See also Lake Carriers Ass'n. v. MacMullan*, 406 U.S. 498 (1972) (declaratory relief proper where plaintiff has a present affirmative duty to comply with a civil statute). Yet Transit waited until 1988 to seek a refund of taxes paid as early as 1980, and waited until 1990 to bring this action, yet now asserts that the State has lost the opportunity to assess additional retaliatory tax for the period in issue. Such machinations call into play equitable defenses to Transit's refund demand. *See* text, *infra*, at pgs. 32-34.

Mr. Melahn's reading of *McKesson* is at odds with *Beam, supra*. There the Court considered the remedial question as intertwined with matters of state law. *Id.* at 2445. The Court stated:

> [N]othing we say here precludes consideration of the individual equities when deciding remedial issues in particular cases.

Id. at 2448. Further the Court pointed out:

> Nothing we say here deprives respondent [Georgia] of his opportunity to raise procedural bars to recovery under state law or to demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter with which *McKesson* did not deal.

Id.

The United States Constitution does not require a full refund as the means of redress. The constitutional requirement is only that the taxpayer successfully complaining of discriminatory tax treatment be placed in the approximate relative position he would have occupied during the tax period but for the imposition of the challenged tax. That requirement may be met by means of a refund, or by other means, or by a combination of both. *McKesson, supra*, at 2252. So long as the effect of the unconstitutional tax is removed and the taxpayer is restored to the approximate relative position he should have occupied but for the challenged tax during the contested period, the Due Process Clause is satisfied. *Id.*

What would Transit's position have been during the refund period, if Transit had been taxed as it now (post-hoc) seeks to be for premium tax? Transit would have been taxed at a zero premium tax rate. However, Transit would have incurred a higher retaliatory tax obligation equal to the lowered premium tax obligation. The United States Supreme Court so held in *Western & So. Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 651, n.2 (1981):

> Western & Southern also challenges a provision of California property tax law, since repealed, which permitted certain domestic insurance companies to credit a greater portion of property tax paid on their principal offices against their premium tax liability than foreign insurers could. [cite omitted] We need not consider this challenge, because any increase in the property tax deduction would merely trigger an offsetting increase in the retaliatory tax. [emphasis added]

Mr. Melahn fails to address this specific holding in his discussion of the set-off of retaliatory taxes ordered by the trial court.

The retaliatory tax is constitutional under the Equal Protection and Due Process clauses. *See Western & So. Life Ins. Co., supra*. It is a tax imposed separately from the premium tax. Its magnitude rises and falls in relation to the magnitude of other taxes, including the premium tax, imposed by Florida on a particular foreign insurer. The United States Supreme Court has affirmed that a taxpayer owing lesser amounts of other state tax obligations owes a correspondingly higher amount under the constitutionally-valid retaliatory tax. The trial court therefore acted well within the permissible range of its equitable discretion in conditioning a refund of premium tax on an offset of the amount of retaliatory tax Transit should have paid in combination with a zero premium tax rate.

Claiming that a contrary conclusion is dictated by *McKesson*, Mr. Melahn ignores the dissimilarity of that case to the situation here presented. *McKesson* rejected the State's attempt to persuade the Court to restructure the very liquor tax found to be unconstitutional in a manner which the state contended the legislature would have imposed it. This argument was rejected, as it would not bring about the competitive nondiscrimination under

that very tax equivalent to what "prompt injunctive relief would have achieved." *Id.* at 2253. Here, in contrast, the set-off of retaliatory tax does not require the supposition of a hypothetical tax structure. Here, an independent, long-standing and valid retaliatory tax imposed by Florida law applies *pro tanto* as to any reduction in Transit's premium tax obligation to Florida. Recognition of that valid tax is in no sense inconsistent with placing Transit in the same relative position it would have enjoyed had it timely sought declaratory or injunctive relief against imposition of the premium tax.

B. Appellee's status as receiver for Transit Casualty Company did not affect the trial court's equitable power to shape a remedy.

This is a taxpayer action against a sovereign state for a refund of taxes paid under an allegedly unconstitutional statute. It is not a dispute under a contract or arising out of a contractual relationship. The question before the Court is not whether set-off of one debt against another is appropriate, but rather, the appropriate shape of the remedy for a taxpayer who has remitted an allegedly unconstitutional tax. *See McKesson, supra*, at 2238. Mr. Melahn fails to recognize the nature of this case as a taxpayer action, and fails to appreciate the significance of that distinction. Mr. Melahn's analysis is not on point.

McKesson and *Beam* contemplate that the courts have broad equitable powers in such a taxpayer's action to shape the remedy in respect to an unconstitutionally discriminating tax, and are only required to place the taxpayer in the approximate relative position he would have occupied but for the unconstitutional tax. That is the clear and certain remedy which

is required. In this case, it is undisputed that Transit would have owed to the State of Florida retaliatory taxes for the years 1980 through 1985 if it did not pay premium tax.[13]

Mr. Melahn contends that, solely because of his status as Receiver for Transit Casualty Company, the court may not reduce a refund of premium taxes by the amount of retaliatory taxes Transit would have been otherwise obligated to pay. According to Mr. Melahn, the State of Florida must file a claim with him, as Transit's receiver, to recover retaliatory taxes which Transit would have owed. He asserts that, otherwise, the State would have an "unfair advantage over other creditors of Transit".

Such reasoning is premised upon Mr. Melahn's misunderstanding of the nature of this case. By asserting the set-off of retaliatory tax, the States did not assert a claim against the receiver, but rather, invoked the court's equitable powers in shaping the appropriate remedy on his claim of constitutional violation. The State is neither a creditor of, nor a claimant against, the estate of Transit. The State did not issue tax assessments against Transit. There is no outstanding debt or contractual obligation between the parties. To the contrary, Mr. Mr. Melahn is the only claimant in this case.

---

[13] See Affidavit of Gaylen Jungling (R87-88; A64-65). Under Florida law, Transit was obligated to pay premium taxes pursuant to Section 624.509, and retaliatory tax under Section 624.429, Florida Statutes. Whether in premium taxes or retaliatory taxes, Transit was obligated to pay an aggregate amount of tax no less than the amount which it paid as premium tax. Pursuant to Section 624.429, Florida Statutes, Transit reduced its retaliatory tax obligation for the years 1980 through 1985 by the amount of premium tax paid. Therefore, if Transit paid no premium tax, it would have been obligated to pay a correspondingly higher amount of retaliatory tax.

Transit's insolvency has no effect on the courts' power to fashion an appropriate constitutional remedy. Mr. Melahn has failed to cite any authority to the contrary. He stands in the shoes of Transit. He is entitled to no different remedy than that to which Transit is entitled. He is not entitled to a different remedy simply because Transit was poorly managed and placed into receivership. Transit should not be held entitled to relief which effectively exempts it both from the premium tax and from its retaliatory tax obligations to this State. The trial court's relief was therefore correct and should be sustained.

C. No statute of limitations prevents set-off of retaliatory tax.

Mr. Melahn's claim for tax refund sounds in mandamus, *State, ex rel. Victor Chemical Works, Inc. v. Gay, supra*, as to which equitable defenses apply. *E.g., State ex rel., Mann v. Burns*, 109 So.2d 195 (Fla. 1969) (laches barred issuance of writ of mandamus). The trial court was therefore correct in requiring set-off of otherwise-due retaliatory taxes on grounds of equity, though such tax had not been assessed.

The State could not have assessed additional retaliatory tax. The State defendants were bound to abide by the presumption of the constitutionality of the premium tax. *E.g., Department of Ed. v. Lewis*, 416 So.2d 455 (Fla. 1982). *See also Florida Export Tobacco Co., Inc. v. Department of Revenue*, 510 So.2d 936, 951-955 (Fla. 1st DCA 1987), *cert. denied* 519 So.2d 986 (Fla. 1987). Indeed, precisely because the State lacked authority to assess additional retaliatory tax unless and until the premium tax is found to be unconstitutional,

equity requires, at a minimum, a set-off of retaliatory tax in this case if the premium tax is found to be invalid. As discussed more fully at pages 25-26 and 32-34, Transit delayed a ripe challenge to the premium tax it was paying from 1980 onward. All the while it was using its premium tax payments to reduce its otherwise-outstanding retaliatory tax obligation to Florida. Transit, through Mr. Melahn, initiated a belated challenge to the constitutionality of the premium tax, and now asserts that the window for assessing additional retaliatory tax under section 95.091, Florida Statutes, has closed. Transit thus hopes to gain both the benefit of having paid premium tax and the return of that tax in full. Courts of equity have inherent discretion to fashion remedies in such a manner as to avoid such inequitable results. Transits' conduct, indeed, would support a complete bar to presentation of its constitutional challenge, as discussed below.

VI. REMAND FOR CONSIDERATION OF THE STATE'S DEFENSES OF WAIVER AND ESTOPPEL IS REQUIRED IF THE COURT AFFIRMS THE TRIAL COURT'S DECLARATION OF UNCONSTITUTIONALITY AND REVERSES THE TRIAL COURT'S RULING ON SET-OFF OF RETALIATORY TAX.

The trial court declined to rule on the defenses of waiver and estoppel which the State asserted. (A1354; R920) Given the trial court's ruling on the set-off of retaliatory tax, it was unnecessary for that court to reach those issues. However, should this Court both affirm the trial court's declaration of unconstitutionality and reverse its decision on the set-off of retaliatory tax, further proceedings would be needed to hear those defenses. Sufficient

facts were pleaded and established below to warrant remand for a plenary hearing on those affirmative defenses, in light of such a ruling by this Court.

The State was required to presume the validity of the premium tax statutes now in issue. Transit delayed a ripe challenge to the statutes during the period 1980 through 1989. All the while, Transit claimed the benefit of the premium tax credited against otherwise-due retaliatory tax. The State was injured as a result of that delay and those representations by Transit. Transit seeks to avoid the obligation for retaliatory taxes which would legally have been due had the premium taxes which it paid not been imposed. Taking advantage of the credits for premium taxes against retaliatory taxes otherwise due, Transit failed to report and pay additional retaliatory taxes for the years in question.

For Transit to now claim that the premium taxes, the payment of which were used to reduce Transit's retaliatory tax liability to Florida during the same period, are unconstitutional and must be fully refunded, and to simultaneously assert that the assessment period for additional retaliatory tax expired, is wholly inequitable. Such conduct allows the invocation of the doctrine of estoppel as to Transit's belated claim.

It is an established corollary of the doctrine of equitable estoppel that one who has affirmatively taken advantage of statutory benefits is estopped from later challenging the statute which conferred the benefit. *See, e.g., National Distributing Co. v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988); Seaboard Coastline Railroad Co. v. McKelvey*, 259 So.2d 777 (Fla. 3d DCA 1972); *McNulty v. Blackburn*, 42 So.2d 445 (Fla. 1949); *Jannett v.*

Windham, 109 Fla. 129, 147 So. 296 (1933), *aff'd.*, 290 U.S. 602 (1933). Federal decisions are consistent. *See Hess v. Mullaney*, 213 F.2d 635 (9th Cir. 1954). *See Also, In re: Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 713 F.2d 274 (7th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

The rationale of those decisions applies equally here. Transit classically seeks to have its cake (return of premium tax) and eat it, too (retain the benefit of the premium tax credit against retaliatory tax). The doctrine of estoppel exists to prevent the realization of such inequity.

Likewise, the essential elements of laches are present here: inaction by the Transit, on an action which was known or should have been known, reliance by executive branch officials on the presumptive validity of the premium tax, a representation by the Transit that the tax was due (in claiming premium tax credit against retaliatory tax liability), and prejudice to the State as to the collection of a proper amount of retaliatory tax because of the delay.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the State's Initial Brief, the trial court's judgment that the premium tax is unconstitutional should be reversed. If not, the trial court's judgment should be vacated and remanded with directions to enter judgment declaring the premium tax to be invalid only from the date of the United States Supreme Court's decision in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). Further the trial

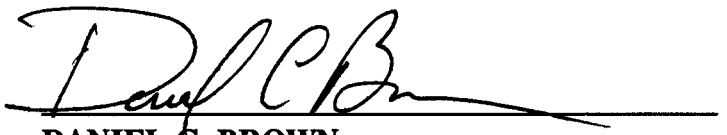
court should be sustained in its decision to off-set retaliatory tax if the premium tax is found to be invalid; in that event, it should likewise be sustained in its judgment that section 215.26, Florida Statutes, partially bars refund of taxes, but its application of that statute to the facts of this case should be reversed. In the alternative, at a minimum, the judgment should be vacated and remanded with instructions to conduct further proceedings on the State's defenses of estoppel and laches.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JOSEPH C. MELLICHAMP, III
Assistant Attorney General
Tax Section
The Capitol
Tallahassee, Florida

and



DANIEL C. BROWN
Florida Bar No. 0191049
Katz, Kutter, Haigler, Alderman,
Davis, Marks & Rutledge, P.A.
First Florida Bank Building
215 S. Monroe Street, Suite 400
Tallahassee, Florida 32301
(904) 224-9634
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to PATRICK J. FARRELL, JR., Fuller, Johnson & Farrell, Post Office Box 1739, Tallahassee, Florida 32302-1739, KENNETH R. HART, Ausley, McMullen, McGehee, Carothers & Proctor, Post Office Box 391, Tallahassee, Florida 32302, and by facsimile and United States Mail to MIRIAM F. GLUECK and LISA A. WEIXELMAN, 4705 Central Kansas City, Missouri 64112, this 31st day of December, 1991.

DANIEL C. BROWN

h:\users\dan\mclahn\answrbrf.2