IN THE SUPREME COURT OF FLORIDA

QUINTON DRYDEN, et al.,

Appellants/Petitioners,

vs. **CASE NO. 87,594**

MADISON COUNTY, FLORIDA, a political subdivision of the State of Florida, and **WES KELLY**, in his official capacity as Tax Collector of Madison County, Florida,

Appellees/Respondents.

FLORIDA DEPARTMENT OF REVENUE'S AMICUS CURIAE BRIEF ON REMAND FROM THE UNITED STATES SUPREME COURT

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STATEMENT OF THE CASE AND FACTS

The United States Supreme Court vacated this Court's prior opinion, Dryden v. Madison County, 696 So. 2d 728 (Fla. 1997), in light of Newsweek, Inc. v. Florida Department of Revenue, ___ U. S. ___, 118 S. Ct. 904 (1998).

SUMMARY OF ARGUMENT

The United States Supreme Court vacated this Court's prior opinion, Dryden v. Madison County, 696 So. 2d 728 (Fla. 1997), in light of Newsweek, Inc. v. Florida Department of Revenue, ___ U. S. ___, 118 S. Ct. 904 (1998).

In doing so it did not reject state law defenses. Res judicata, statutes of non-claim, statutes of limitations and reliance may still form the basis for denying refunds in appropriate cases.[1]/

The Supreme Court held that a State may not create a defense anew and change the rules in mid-stream. It cannot "bait and switch." In other words, the rules by which one may challenge a tax and seek a remedy must remain consistent.

Previous opinions of this Court, and of the District Courts establishes the "reliance" defense. Reliance must be based upon a previous court decision upholding a statute that the Court,

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[1]/ The United States Supreme Court expressly allows "reliance" factors to be considered by state courts in fashioning the proper "remedy" after a tax is declared invalid. See, American Trucking Association, Inc. v. Smith, 496 U. S. 167, 110 S. Ct. 2323 (1990), (issued the same day the Court released the McKesson decision.) See also, James B. Beam Distilling Co., v. Georgia, 501 U. S. 529, 544 (1991).

which is considering the refund, is overruling. This case does not involve reliance on a previous decision.

This Court's original decision in this matter set forth a new test for reliance which had been rejected in Greer, infra. This Court expanded the grounds upon which a refund could be denied. The United States Supreme Court citing Newsweek determined that the expansion could not occur in this case. That is the sole basis for the order vacating this Court's earlier decision.

ARGUMENT

The only issue before this Court is the question originally certified to this Court by the First District Court of Appeal in Dryden v. Madison County, 672 So. 2d 840 (Fla. 1st DCA 1996), which is as follows:

> Is the holding of Gulesian v. Dade County School Bd., 281 So. 2d 325 (Fla. 1973), which provides that under certain circumstances a governmental entity need not refund proceeds from a tax or, in this case, a special assessment that is later determined to be illegal, still valid after the decisions of McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990), and Kuhnlein v. Department of Revenue, 662 So. 2d 308 (Fla. 1995).

Dryden, 672 So. 2d, at 844.

The answer to the certified question must be in the affirmative. This Court is **free** to **reaffirm** that reliance is a valid defense to a refund in an applicable case. Nothing in the decision of the United States Supreme Court dictates otherwise.

This Court's decisions on reliance have not been altered or overridden by McKesson, or later decisions of the United States Supreme Court. The reliance doctrine is simply not applicable to the instant case.

I. GULESIAN DOES NOT APPLY ABSENT A PRIOR COURT DECISION UPON WHICH RELIANCE IS BASED

Where a taxing authority has relied upon a court ruling upholding a tax statute that is later stricken, the defense of reliance can bar refunds. State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924); Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973).

When a federal constitutional issue is resolved, the "rule of law" is controlled by federal court decisions and must be followed by the state courts. McKesson. However, even when a federal constitutional issue is involved, the "remedy" to be applied as a result of the "rule of law" is controlled by **state** law. James B. Beam Distilling Co., v. Georgia, 501 U. S. 529, 111 S. Ct. 2439 (1991); Bacchus Imports, Ltd. v. Dias, 468 U. S. 263, 104 S. Ct. 3049 (1984). Florida law concerning the appropriate remedy is found in State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924); Gulesian v. Dade County School Board, 281 So. 2d 325 (Fla. 1973).

Greer found that a court may consider a party's reliance on a prior adjudication upholding a statute. The issue was whether the law entitled a bond-holder to a writ of mandamus requiring municipal officers to levy a tax to pay the interest and principal on a bond issued pursuant to a state statute which the state supreme court subsequently found unconstitutional. Greer, 102 So., at 741. This Court held that:

> [w]here a legislative enactment authorizing a municipality to issue bonds has never been adjudged to be constitutional, and it is judicially declared to be in conflict with organic law, the Constitution by its dominant force renders the enactment inoperative ab initio, and bonds issued thereafter are void because [the bonds were] issued without authority of law.

Id., at 743. This Court, however, noted that bonds sold "while the statute authorizing the bonds is duly adjudged to be

constitutional, are valid, and the purchaser is protected from a subsequent decision of invalidity by the property rights clauses of organic law, because the bonds being valid when issued are lawful obligations to pay money . . ." Id. This Court explained that:

> Rights acquired under a statute while it is duly adjudged to be constitutional are valid legal rights that are protected by the Constitution, not by judicial decision. But rights acquired under a statute that has not been adjudged valid are subject to be lost if the statute is adjudged invalid, though the statute was considered valid by eminent attorneys, public officers, and others.

Greer, 102 So., at 745. Greer permits a court to consider reliance on a judicial decision upholding a statute that is subsequently reversed when determining the appropriate relief.

Gulesian demonstrates that Florida courts consider a taxing authority's reliance on prior case-law upholding a tax scheme, which is later found unconstitutional, in fashioning an appropriate remedy. The issue there was whether a taxpayer was entitled to a refund. The taxing authority levied ad valorem taxes in excess of 10 mills based on a state statute which was subsequently found unconstitutional. Gulesian, 281 So. 2d, at 326. A United States District Court struck the Florida Constitutional provision limiting ad valorem millage elections to freeholders as violating the federal constitution. Id., at 327. The federal court found the unconstitutional provision inseparable from the rest of the state constitutional text which

capped ad valorem taxes at 10 mills. Id.

While the federal court's decision was on appeal, the Florida legislature passed a state statute which permitted ad valorem levies in excess of 10 mills, if made for certain purposes. Id. The Dade County school board enacted a levy above the 10 mill cap, and collected an estimated $7,700,000. Id. The federal appeals court subsequently overturned the district court's decision. Id. Consequently, the Florida Constitutional cap on 10 mills was valid. Id.

The state trial court did not order a refund of $7,700,000, because: 1) taxpayers paid the tax "without protest and not under compulsion", 2) a refund would compound the school board's budgeting problems, 3) and that the school board had acted in "good faith reliance on a presumptively valid statute." Id., at 326. On review, this Court affirmed the trial court's determination not to grant a refund citing a number of significant "equitable considerations" and concluding that the school board enacted the ad valorem tax in reliance on a valid state statute. Id., at 327.

Since Gulesian, Florida courts have consistently considered a taxing authority's reliance on case-law upholding a tax statute that is later found invalid when fashioning an appropriate remedy. In National Distributing Co., Inc., v. Office of the Comptroller, 523 So. 2d 156 (Fla. 1988), this Court addressed whether a taxpayer was entitled to a refund. Tax was collected

between 1981 and 1984 based on liquor tax statutes that provided for preferential treatment for alcoholic beverages manufactured with "Florida-grown" products. Id., at 157. The Court recognized that the United States Supreme Court's 1984 decision in Bacchus v. Dias, 468 U. S. 263 (1984), required finding that the Florida liquor taxes unconstitutionally discriminated against interstate commerce. National Distributing, 523 So. 2d, at 157.

In determining whether to permit refunds of liquor taxes collected before Bacchus, this Court noted that the state collected the taxes in "good faith reliance" on decisions of the United States Supreme Court holding States had plenary power to regulate alcoholic beverages. National Distributing, 523 So. 2d, at 158. This Court was receding from its holding in Faircloth v. Mr. Boston Distiller Corp, 245 So. 2d 240 (Fla. 1970), which had upheld a Florida liquor tax statute providing preferential treatment for liquors bottled in Florida. 523 So. 2d at 158. Based in part on the taxing authority's reliance on United States Supreme Court precedents and Faircloth, this Court in National Distributing denied the taxpayers a refund for liquor taxes paid before 1984.[2]/ See also, Coe v. Broward County, 358 So. 2d 214 (Fla. 4th DCA 1978) (Trial court order denying relief was

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[2]/ National Distributing, addressed the same issue that was presented to the Georgia Supreme Court in James B. Beam Distilling Co. v. State, 437 S.E. 2d 782 (Ga. 1993). In that case, the Georgia Supreme Court, on remand from the United States Supreme Court, denied the taxpayer retroactive relief based on state law issues.

reversed by the Fourth District, where the facts established that the taxing authority did not show "good faith" reliance in levying taxes in excess of the statutory property tax ceiling; and Fourth District reversed the trial court's denial of a refund where denial was based on the high administrative costs of providing refunds).

In contrast to cases such as Gulesian, and National Distributing, it is equally clear that states cannot claim reliance where there is no prior court adjudication upholding the challenged tax scheme. One example is Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994).

Kuhnlein addressed the constitutionality of a statute which imposed an impact fee on cars purchased or titled in other states that were subsequently registered in Florida by persons having or establishing residence in Florida. Id., at 719. The Court held that the Florida impact fee resulted in discrimination against out-of-state economic interests, and thus, violated the federal Commerce Clause.[3]/ Id., at 724. Because the Court considered the validity of the impact fee statute for the first time, it is clear that the State did not place reliance interests before the Court.

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[3]/ This Court has recognized that it is the Florida Legislature that fashions a retroactive remedy with respect to taxes declared unconstitutional. Department of Revenue v. Kuhnlein, 646 So. 2d 717, 726 (Fla. 1994)(on motion for rehearing); Division of Alcoholic Beverages and Tobacco v. McKesson, 574 So. 2d 114, 116 (Fla. 1991).

This reading is consistent with American Trucking Associations, Inc. v. Smith, 496 U. S. 167, 110 S. Ct. 2323 (1990). There the question was whether the Court's decision in American Trucking Association, Inc. v. Scheiner, 483 U. S. 266, 107 S. Ct. 2829 (1987), was to have retroactive "remedial" effect. In Smith, the ATA had sought a refund of taxes paid to Arkansas. The Supreme Court ruled that Scheiner had invalidated the very type of tax at issue in Smith. Smith, 496 U. S., at 173, 110 S. Ct., at 2328. However, the Supreme Court determined that Scheiner overruled a long line of precedent, starting with Aero Mayflower Transit Co. v. Georgia Public Service Commission, 295 U. S. 285, 55 S. Ct. 709 (1935). Smith, 496 U. S., at 179-180, 110 S. Ct., at 2331-2332. Based on this finding, the High Court ruled that a refund of taxes was not required.

In rendering its opinion, the Supreme Court was aware of McKesson. In fact, McKesson was decided the same day as Smith. The distinction was made because:

> [u]nlike McKesson, where the State enacted a tax scheme that 'was virtually identical to the Hawaii scheme invalidated in Bacchus Imports, Ltd. v. Dias, (citations omitted), and thus the State could 'hardly claim surprise at the Florida courts' invalidation of the scheme.' ibid., here the State promulgated and implemented its taxing scheme **in reliance on the Aero Mayflower precedents of this Court**. In light of theses precedents, legislators would have good reason to suppose that enactment of the [Arkansas] tax would not violate their oath to uphold the United States Constitution, and the State Supreme Court would have every reason to consider itself bound by those precedents to uphold the tax

> against a constitutional challenge. Similarly, state tax collection authorities would have been justified in relying on state enactments valid under then-current precedents of this Court, particularly where, as here, the enactments were upheld by the State's highest court.

Smith, 496 U. S., at 182, 110 S. Ct., at 2333. Thus, "because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." Id.

II. MCKESSON DOES NOT PRECLUDE APPLICATION OF GULESIAN OR OTHER DEFENSES IN AN APPROPRIATE CASE

A **pre-existing**, separate, independent rule of state law, having nothing to do with retroactivity -- a rule containing certain procedural requirements for any tax assessment or refund suit -- may bar a taxpayers' refund suit, irrespective of the invalidity of the underlying tax. McKesson; Reynoldsville Casket Co. v. Hyde, 514 U. S. 749, __, 115 S. Ct. 1745, 1750 (1995).

A. MCKESSON DOES NOT MANDATE REFUNDS

There appears to be a misunderstanding among many as to the meaning of McKesson, and the later cases of the United States Supreme Court concerning the "requirement" to grant a refund in all tax refund cases where the state tax is determined to be invalid. Many are undoubtedly convinced that McKesson has rewritten the rule on refunds. In particular, many argue that McKesson overrules state "procedural" statutes, *res judicata*, and "reliance" defenses in all cases if, and when, a tax statute is

found to be invalid. McKesson has not rewritten state law with regard to refunds. The United States Supreme Court expects states to enact a refund procedure, adhere to the doctrine of *res judicata*, and rely on state law defenses, when a tax statute is found to be invalid.

The confusion seems to lie in the misunderstanding of the differences between the "rule of law" and the "remedy" that may be available to a taxpayer. While McKesson and subsequent cases may have decided that the "rule of law" announced by the United States Supreme Court is to be given retroactive effect in all open cases, they did not decide that a refund is always due. See, e.g., James B. Beam Distilling Co. v. Georgia, 501 U. S. 529, 534-535, 111 S. Ct. 2439, 2433 (1991).

No state must, as a matter of federal law, provide retroactive "remedies" in every case. Under McKesson, the procedural requirements and the remedial relief to be afforded a taxpayer after a tax is invalidated is a matter of state law. See, Fulton Corporation v. Faulkner, __ U. S. __, 116 S. Ct. 848, 86-862 (1996).

The United States Supreme Court has repeatedly upheld the continuing vitality of state "procedural" statutes and their effect on the "remedy" states may provide for invalid taxes, something not directly addressed in McKesson. James B. Beam Distilling Company v. Georgia, 501 U. S. 529, 111 S. Ct. 2439 (1991) (hereinafter "Beam"), Harper v. Virginia Department of

Taxation, 509 U. S. 86, 113 S. Ct. 2510 (1993) (hereinafter "Harper"), and Fulton Corporation v. Faulkner, __ U. S. __, 116 S. Ct. 848 (1996) (hereinafter "Faulkner").

In Beam, the issue concerned application of the rule of law decided in Bacchus Imports, Ltd. v. Dias, 468 U. S. 263 (1984), which declared a tax unconstitutional. Beam was challenging the same type of tax statutes in another state. The Beam Court held that where a "rule of law" was decided, the rule of law was to be applied retroactively to other cases. Beam, 501 U. S., at 532, 111 S. Ct., at 2441.

The United States Supreme Court discussed the issue of retroactivity in detail. Id., 501 U. S., at 532-536, 111 S. Ct., at 2442-2443. The United States Supreme Court discussed the difference between a "choice of law" and a "remedy." While a "choice of law" is to be applied retroactively, there sometimes is a problem when retroactivity is applied to a "remedy." As that Court stated:

> It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law, "a choice ... between the principle of forward operation and that of relation backward." Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932). Once a rule is

> found to apply "backward," there may then be a further issue of remedies, i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to possible constitutional thresholds, see McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court. See American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 210, 110 S.Ct. 2323, 2348, 110 L.Ed.2d 148 (1990) (STEVENS, J., dissenting).

Beam, 501 U. S., at 534-535, 111 S. Ct., at 1143.

However, in making its ruling on the choice of law question in that case, the Supreme Court stated:

> [t]he grounds for our decision today are narrow. They are confined entirely to an issue of **choice of law**: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others **not barred by procedural requirements or res judicata**.

Id., 501 U. S., at 544, 111 S. Ct., at 2448 (e.s.).

By such a statement, the United States Supreme Court has made it clear that it considers that a claim for refund based upon payment of an unconstitutional tax can be barred under a state's procedural requirements, including, for example, the fact that the taxpayer has already litigated the matter and is now barred by res judicata.[4]/

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[4]/ This would be consistent with its holding that "[a] constitutional claim can become time-barred just as any other claim can. . . . Nothing in the Constitution requires otherwise." Block v. North Dakota, 461 U. S. 273, 292, 103 S. Ct. 1811, 1822 (1983).

The more recent opinion announced in Harper, and Faulkner, have not altered this line of reasoning. Harper, at 113 S. Ct., at 2520, noted that the question of remedy is for the Virginia courts to decide after stating "[w]e do not enter judgment for petitioners, however, because federal law does not necessarily entitle them to a refund." Harper, 113 S. Ct., at 2519. The Faulkner, Court determined that the petitioners had to go to the North Carolina courts for relief, from which they might be procedurally barred.[5]/ Faulkner, 116 S. Ct., at 861-862.

Based on McKesson, and Beam, the rule of law on remedy is clear. If the state taxing statute is found unconstitutional, state law determines the taxpayer's appropriate remedy or relief consistent with due process. Furthermore, in fashioning the appropriate remedy, the states are free to raise any procedural bars or reliance interests which may prevent retroactive relief.[6]/

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[5]/ "As the question whether Fulton has properly complied with the procedural requirements of North Carolina's tax refund statute, § 105-267, ought to come before the state courts in the first instance." Cf. Swanson v. State, 335 N.C. 674, 680-681, 441 S.E.2d 537, 541 (noting that "[f]ailure to comply with the requirements in section 105-267 bars a taxpayer's action against the State for a refund of taxes"), cert. denied, 513 U. S.___, 115 S. Ct. 662 (1994).

[6]/ The conclusion that State courts may raise any procedural bars or reliance issues in determining the appropriate relief to be granted to a taxpayer after a state tax statute is struck as unconstitutional is found in the subsequent history of James B. Beam Distilling Co., v. Georgia, 501 U. S. 529, 111 S. Ct. 2439 (1991). On remand from the Supreme Court, the Georgia Supreme Court denied James Beam Company a refund on two basis: 1) James Beam, a manufacturer did not pay the tax, and thus, lacked

If there were any questions remaining after Beam, Harper, or Faulkner, the United States Supreme Court resolved the effect McKesson had on "independent" state law procedural statutes in the case of Reynoldsville Casket Co. v. Hyde, 514 U. S. 749, __, 115 S. Ct. 1745 (1995). In that case the United States Supreme Court discussed in detail the McKesson decision and the "special circumstances of tax cases." Reynoldsville, 514 U. S., at ___, 115 S. Ct., at 1750. In its discussion, the United States Supreme Court stated:

> Suppose a State collects taxes under a taxing statute that this Court later holds unconstitutional. Taxpayers then sue for a refund of the unconstitutionally collected taxes. Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. But, what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity--a rule containing certain procedural requirements for any refund suit--nonetheless barred the taxpayers' refund suit? See McKesson Corp., supra, at 45, 110 S.Ct., at 2254; Reich v. Collins, 513 U.S. ----, ----, 115 S.Ct. 547, 550, 130 L.Ed.2d 454 (1994). Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim. See McKesson Corp., supra, at 45, 110 S.Ct., at 2254

Reynoldsville, 514 U. S., at __, 115 S. Ct., at 1750.

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standing to challenge tax; and 2) James Beam's failure to use "predeprivation" procedures under Georgia law to challenge the tax waived the right to obtain a refund for taxes paid. James B. Beam Distilling Co v. State, 437 S.E. 782, 786 (Ga. 1993).

CONCLUSION

WHEREFORE, the Department of Revenue, as Amicus Curiae, respectfully move this Court to answer the certified question in the affirmative, in as much as reliance may still form the basis for denying refunds in appropriate cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail to: **GEORGE T. REEVES, ESQ.** and **EDWIN B. BROWNING JR., ESQ.**, Davis, Browning & Schnitker, P.O. Drawer 652, Madison, Florida 32340-0652, **KENZA VAN ASSENDERP, ESQ.**, Young, van Assenderp & Varnadoe, P.O. Box 1833, Tallahassee, Florida, 32302 and **LARRY E. LEVY, ESQ.**, The Levy Law Firm, 1828 Riggins Road, Tallahassee, Florida 32308, this 11th day of May, 1998.

ERIC J. TAYLOR
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