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 AMENDED AMICUS CURIAE BRIEF

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STATEMENT OF THE CASE AND FACTS

Pursuant to Fla. R. App. P. 9.210(c), Amicus Curiae, State of Florida, Department of Revenue (hereinafter "the Department"), basically agrees with the Statement of the Case and Facts as set forth by Petitioners, Quinton Dryden, et. al. (hereinafter "Dryden"). However, it is the Department's position that the Statement of Case and Facts as set forth by the First District Court of Appeal (hereinafter the "District Court"), in its decisions of Madison County v. Foxx, 636 So. 2d 39 (Fla. 1st DCA 1994) and Dryden v. Madison County, ___ So. 2d ___, 21 Fla. Law Weekly, D587 (Fla. 1st DCA March 5, 1996) accurately depicts the history of the litigation below.

SUMMARY OF ARGUMENT

ISSUE I: McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) and Kuhnlein v. Department of Revenue, 662 So.2d 308 (Fla. 1995), did not overrule this Court's holding in Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), that when a state tax statute is found to be invalid, the state court in fashioning a remedy may consider the taxing authority's "good faith" reliance on case-law previously upholding the tax statute. In fact, McKesson and its progeny specifically permit a state court in fashioning a remedy to consider any procedural

bars or reliance interests which may prevent retroactive relief.

ISSUE II: This Court should decline to award postjudgment interest in tax refund cases for two reasons: First, interest should not be awarded in tax refund cases because a tax refund is not a money judgment, and thus, section 55.03, which awards interest on judgments, is not applicable to tax refunds. Second, an examination of Florida Statutes and case-law shows that the legislature has not expressly and unequivocally waived the State's sovereign immunity in order to allow the awarding of interest in tax refund cases.

ARGUMENT

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)?

The State contends that this Honorable Court should answer the First District Court of Appeal's certified question in the affirmative. The Petitioners and Amicus in support of the Petitioners appear to have a fundamental misunderstanding of the intent and extent of McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S.Ct. 2238 (1990), and the latest

cases of the United States Supreme Court. Notwithstanding the Petitioners' position, these cases do not stand for the proposition that a state must, as a matter of federal law, provide retroactive "remedies" in all cases involving the invalidity of a taxing statute.[1]

To the contrary, based on McKesson, supra, Smith, infra, and James Beam, infra, two rules of law are clear when a state taxing statute is held unconstitutional. First, the determination of whether a rule of law is to be applied retroactively is a question of federal law. Second, 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

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[1] The question presented in the instant case is whether retroactive relief is the appropriate remedy when a court finds that a county's special assessment violates statutory law. Unlike McKesson v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 110 S.Ct. 2238 (1990), and its progeny, the tax in the instant case does not involve a federal constitutional violation. As an amicus, the State does not address the merits of the appropriate remedy in the instant case. The State's amicus brief, rather, addresses the narrow point that McKesson and its progeny did not overrule the holding in Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), that when a state tax statute or ordinance is held invalid, the state court in fashioning a remedy may consider the taxing authority's reliance on case-law previously upholding the tax statute or ordinance.

prevent retroactive relief.

McKesson and its progeny did not disturb Gulesian v. Dade County School Board, 281 So.2d 325 (Fla. 1973), which held that when a state tax statute is found to be invalid, the state court in fashioning a remedy may consider the taxing authority's reliance on case-law previously upholding the tax statute. Moreover, the holding in Kuhnlein v. Department of Revenue, 662 So.2d 308 (Fla. 1995), is consistent with the rule of law in Gulesian. An examination of Kuhnlein, shows that this Court granted retroactive relief when it found that a new state taxing statute was unconstitutional. Further, because the State did not have a previous court ruling upholding the disputed tax statute in Kuhnlein, Gulesian's "good faith" reliance was not applicable under the specific facts in Kuhnlein. Thus, it is clear that McKesson and Kunhlein did not overrule the narrow holding in Gulesian,and that this Court should answer the certified question in the affirmative.

In McKesson, the Supreme Court addressed whether federal due process required a State to provide a retroactive remedy where the state court invalidated a tax statute on the basis of the Commerce Clause, but the state court provided the taxpayer prospective relief only. Id. at 2247. The facts in McKesson

show that until 1985, the Florida Liquor Tax provided preferential treatment for manufacturers using certain "Florida-grown" products. Id. at 2243. The Florida legislature amended the Florida Liquor Tax following the Supreme Court's decision in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 104 S.Ct. 3049 (1984), which invalidated a similar preferential taxing statute in Hawaii. McKesson, 110 S.Ct. 2243. The amended Florida Liquor Tax deleted the preferences for "Florida-grown" products and replaced them with special rate reductions for certain specified products, all of which were commonly grown in Florida. Id.

McKesson corporation, a taxpayer who did not qualify for the special rate reductions, paid the applicable taxes as required after the revised Liquor Tax went into effect. Id. McKesson, however, applied for a refund from the Florida Comptroller on the grounds that the tax was unlawful. Id. Following the Comptroller's decision denying McKesson relief, McKesson challenged the amended tax statute as violating the Commerce Clause. Id. McKesson sought repayment of the funds pursuant to a state statute which provides for a tax refund due to overpayment or payment made in error.[2] Id.

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[2] Section. 215.26(1)(a) and (c), Fla. Stat.

The state trial court granted McKesson partial summary judgment on the ground that the amended tax statute violated the Commerce Clause. Id. at 2244. The trial court, however, declined to order a refund or any other form of relief for the taxes previously paid. Id. On review to the Florida Supreme Court, the court affirmed the trial court's ruling that the amended Liquor Tax unconstitutionally discriminated against interstate commerce. Id. The Florida Supreme Court also affirmed the trial court's refusal to order a tax refund, declaring that "the prospective nature of the rulings below was proper in light of the equitable considerations present in this case." Id. at 2244 (quoting McKesson v. Division of Alcoholic Beverages and Tobacco, 524 So.2d 1000, 1010 (Fla. 1988)).

The United States Supreme Court granted certiorari to address whether federal law entitled McKesson to a partial tax refund, and consolidated the case with American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 110 S.Ct. 2323 (1990). The Court noted that it was undisputed that state supreme court acted properly in awarding McKesson declaratory and injunctive relief against continued enforcement of the discriminatory provisions. Id. at 2247. Consequently, the sole issue before the Court was whether prospective relief, by itself, fulfilled the requirements

of federal law. Id.

The Court explained in detail the scope of the State's obligation under federal due process to provide retroactive relief as part of a postdeprivation procedure in tax cases. Id. at 2247-49. The Court found that "[b]ecause exaction of a tax constitutes a deprivation of property, the State must provide procedural safeguards against unlawful exactions in order to satisfy the commands of the Due Process Clause." Id. at 2250. Under the due process requirement, the Court held that a State may provide for either a "predeprivation process[3]" or a "postdeprivation process[4]." The Court found that the Florida

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[3] A "predeprivation process" is one in which the law authorizes a taxpayer to challenge a tax prior to payment. McKesson, 496 U.S. at 36, 110 S.Ct. at 2250. A process which provides a taxpayer a means to challenge a tax before paying it satisfies the Due Process Clause's "root requirement" that an individual be given an opportunity for hearing before being deprived of a significant property interest. Id. Contrary to the situation in found in McKesson, the State has provided more than ample "predeprivation remedies" with the enactment of Ch. 72, Florida Statutes. Section 72.011, Florida Statutes (1995), sets up the procedure for a taxpayer to challenge the legality of a tax assessment or denial of a refund. In the area of non-ad valorem assessments Section 197.3632(4)(7, (c), Fla. Stat., provides a procedural mechanism for the pre-assessment and challenge to non-ad valorem assessment. Chapter 86, Fla. Stat., is available for all other challenges.

[4] A "postdeprivation process" is one in which the law permits a taxpayer to challenge a tax after payment of the tax. McKesson, 110 S.Ct. at 2250.

Liquor tax required a taxpayer to pay the tax before challenging the tax. Id. at 2251. Consequently, due process required Florida's postdeprivation process to "provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy' for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one." Id. at 2251 (citation and footnote omitted).

The Court held in McKesson that when a State requires a taxpayer to remit their taxes in a timely fashion, before challenging the validity of the tax, "federal due process principles . . . require the State's postdeprivation procedure to provide a 'clear and certain remedy,' for the deprivation of tax moneys in an unconstitutional manner." Id. at 2258. Consequently, the Court remanded McKesson to the state court to fashion any form of relief, so long as the relief cured any unconstitutional discrimination against interstate commerce during the contested tax period. Id.

In American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 110 S.Ct. 2323 (1990), the case consolidated with McKesson, the Supreme Court addressed whether its decision in American Trucking Assns., Inc. v. Scheiner, 483 U.S. 266, 107 S. Ct. 2829 (1987),

applied retroactively to taxation of highway use prior to the date of Scheiner. 110 S. Ct. at 2327. In Smith, a taxpayer in 1983 brought a state court challenge to Arkansas' newly enacted flat highway tax on large trucks as violating the Commerce Clause. Id. at 2327. The Arkansas supreme court upheld the constitutionality of the tax statute based on Capitol Greyhound Lines v. Brice, 339 U.S. 542, 70 S.Ct. 806 (1950), and Aero Mayflower Transit Co. v. Board of Railroad Comm'rs of Mont., 332 U.S. 495, 68 S.Ct. 167 (1947).

The taxpayers appealed to the Supreme Court, and the Court accepted the case pending its decision in Scheiner, which involved a similar constitutional challenge to a Pennsylvania flat highway tax. In Scheiner, decided June 1987, the Court "held that unapportioned flat taxes such as those imposed by Pennsylvania penalized free trade among the states." Smith, 110 S. Ct. at 2328. Three days after deciding Scheiner, the Supreme Court vacated the Arkansas judgment, and remanded the case back to state court in light of Scheiner. Id. On remand, the Arkansas supreme court held the flat highway tax unconstitutional, but declined to order tax refunds for taxes collected before the Scheiner decision. The Court granted certiorari to review the Arkansas supreme court's decision.

The Supreme Court in addressing whether the rule of law in Scheiner should be applied retroactively, first recognized that because of federal-state comity issues, state courts are entrusted with the initial duty of determining the appropriate relief or remedy to be given to taxpayers when state taxes are found to be unconstitutional. Smith, 110 S.Ct. at 2330. The Court noted that it "is important to distinguish the question of retroactivity at issue in [Smith] from the distinct remedial question at issue in McKesson." Smith, 110 S.Ct. at 2331. Applying the three-part test announced in Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct. 349 (1971), the Court determined that it would be inequitable to apply the rule of law in Scheiner retroactively based in part on Arkansas' reliance in enacting its flat tax based on the Court's prior rulings which supported these types of flat taxes. 110 S.Ct. at 2333. Therefore, the Court refused to apply Scheiner "retroactively to invalidate taxation on highway use prior to the date of [Scheiner]." Id. at 2339.

The Court further clarified the federal-state comity policy that state courts determine the appropriate remedy when a state tax is held unconstitutional in James B. Beam Distilling Co., v. Georgia, 501 U.S. 529, 111 S. Ct. 2439 (1991).

The issue in James Beam was whether the Supreme Court's

ruling in Bacchus Imports, Ltd v. Dias, supra, applied retroactively to claims arising on facts predating that decision. 501 U.S. at 532. The facts in James Beam show that prior to 1985, Georgia state law imposed an excise tax on imported alcohol and distilled spirits at a rate double that imposed on alcohol and distilled spirits manufactured from Georgia-grown products. Id. After the Court's decision in Bacchus, which struck a similar tax statute, James Beam Distilling Company, a taxpayer, sought a refund representing the full amount of taxes it paid under the unconstitutional Georgia statute for the years 1982 through 1984. Id. at 533. The Georgia Supreme Court affirmed the trial court's ruling that the tax statute violated the Commerce Clause under Bacchus, and the denial of the refund request. Id. The Georgia Supreme Court reasoned that the law did not entitle James Beam to retroactive application of Bacchus because Bacchus established "a new rule of law by overruling past precedent" and that "unjust results" would follow from the retroactive application. Id. On certiorari, the Supreme Court overturned the Georgia supreme court, and held that "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 res judicata." Id. at 544. Consequently, the Court

held that the Georgia courts erred in not applying Bacchus retroactively to the facts in James Beam. The Court, however, iterated its holdings that "the remedial inquiry is one governed by state law." 501 U.S. at 535. In remanding the case back to the Georgia courts to determine the appropriate remedy, the Court stated:

> As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or their consideration obviated by, issues of state law." Nothing we say here deprives respondents of their opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided, a matter which McKesson did not deal.

501 U.S. at 544.

Since the James Beam decision, the Supreme Court has adhered to its analysis that federal law determines the retroactive application of rule of law, while state law determines the appropriate remedy to be given when the Supreme Court finds a state taxing statute unconstitutional. See Harper v. Virginia Dept. of Taxation, __ U.S. __, 113 S.Ct. 2510, 2519 (1993)(holding that Court's decision striking a state tax statute, which discriminated against the retirement pensions of federal retirement benefits, as violating intergovernmental tax immunity would be applied retroactively to instant case; but, the

Court would not enter a judgment because state court must provide relief consistent with due process principles); and Fulton Corp., v. Faulkner, __ U.S. __, 116 S.Ct. 848, 862 (1996)(holding that state taxing statute violated Commerce Clause, and that state law fashions remedy for taxpayer).

Based on McKesson, Smith, and James Beam, two rules of law are clear when a state tax statute is held unconstitutional. First, the determination of whether a rule of law is to be applied retroactively is a question of federal law. Second, 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.[5]

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[5] 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 Company, a manufacturer did not pay the tax, and thus, lacked standing to challenge tax; and 2) James Beam Company's failure to use "predeprivation" procedures under Georgia law to challenge the tax waived the right to obtain a refund for taxes paid on statute. James B. Beam Distilling Co v. State, 437 S.E. 782, 786 (Ga. 1993).

Turning to the certified question in the instant case, it is clear that McKesson, Smith, and James Beam have not overruled or abrogated Gulesian or the seminal case of State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924), which hold that in determining a taxpayer's appropriate remedy after a tax statute is found unconstitutional, state courts may consider the taxing authorities reliance on prior case-law upholding the tax statute. Gulesian does not stand for the proposition that "equities" prevent the granting of retroactive relief.

In State ex rel. Nuveen v. Greer, 88 Fla. 249, 102 So. 739 (1924), this Court articulated the foundation that a court may consider a party's reliance on a court's prior adjudication upholding a statute in formulating a remedy. The issue in Greer 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. 102 So. at 741. This Court held that "[w]here a legislative enactment authorized 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.

102 So. at 745. Thus, under Greer, the law clearly required a court to consider a party's reliance on case-law upholding a statute, which is subsequently found unconstitutional, in determining whether to grant the party relief.

Similar to Greer, the supreme court's decision in 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 in Gulesian was whether a taxpayer was entitled to a refund

when the facts showed that the taxing authority levied ad valorem taxes in excess of 10 mills based on a state statute which was subsequently found unconstitutional. 281 So. 2d at 326. The facts in Gulesian show that 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. Furthermore, the federal district 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 district 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 enumerated purposes. Id. The Dade County school board enacted a .82 mills 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 that the unconstitutional provision was inseparable from the rest of the state constitutional text, which imposed the 10 mills cap. Id. Consequently, the Florida Constitutional cap on 10 mills was considered valid. Id.

The state trial court did not order a tax refund because the court found: 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 based on "equitable considerations" that the school board enacted the ad valorem tax in reliance of a valid state statute, and then provided a string cite of cases. Id. at 327.

The decision in Gulesian, while referencing "equitable considerations," is an example of a Florida court considering a taxing authority's reliance on the validity of a tax statute, which is later found to be invalid, in determining the appropriate remedy. The facts in Gulesian show that the school board relied on a state statute allowing more than 10 mills. Further, the facts show that the legislature passed the tax statute following a federal court's striking the 10 mill cap. In the absence of a state constitutional provision limiting the ad valorem millage, the state statute at issue in Gulesian was valid. Consequently, the school board's reliance on the presumably valid statute foreclosed the granting of a refund for taxes collected before the federal circuit court reinstated Florida's millage cap.

Since Gulesian, Florida courts have consistently considered the taxing authority's reliance on prior case-law upholding a tax-scheme, which is later found invalid, in fashioning the appropriate remedy. In National Distributing Co., Inc., v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988),[6] this Court addressed whether a taxpayer was entitled to a refund for a tax collected between 1981 and 1984 based on liquor tax statutes which provided for preferential treatment for alcoholic beverages manufactured with "Florida-grown" products. Id. at 157. This Court recognized that the United States Supreme Court's 1984 decision in Bacchus required finding that the Florida liquor taxes unconstitutionally discriminated against interstate commerce. 523 So.2d at 157.

In determining whether to permit refunds of liquor taxes collected before Bacchus, this Court noted that the state

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[6] The State disagrees with the amicus brief for the Florida Home Builders Associations implication that the United States Supreme Court reviewed and reversed National Distributing Co., Inc., v. Office of the Comptroller, 523 So.2d 156 (Fla. 1988). The language cited by the amicus, at pages 5 and 10, as reversing National Distributing is from the Court's decision in McKesson, which did not review National Distributing. Unlike McKesson, National Distributing concerned liquor taxes collected prior to the Court's decision in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), and liquor tax statutes prior the 1985 amendment to the tax statute in McKesson. Thus, it is erroneous to suggest that McKesson overruled National Distributing.

collected the taxes in "good faith reliance" of the United States Supreme Court's decisions that the states had plenary power to regulate alcoholic beverages. 523 So.2d at 158. Furthermore, this Court also receded from its holding in Faircloth v. Mr. Boston Distiller Corp, 245 So.2d 240 (Fla. 1970), which 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 precedence and Faircloth, this Court in National Distributing denied the taxpayers a refund for liquor taxes paid before 1984.[7] See also Coe v. Broward County, 358 So.2d 214 (Fla. 4th DCA 1978)(reversing trial court's order denying relief where the facts establish that taxing authority did not show "good faith" reliance in levying taxes in excess of the statutory property tax ceiling, and reversing 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

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[7] National Distributing Co., 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). As explained in footnote 5, supra, the Georgia Supreme Court denied the taxpayer retroactive relief based on state law issues.

Distributing, it is equally clear that states cannot claim reliance to prevent retroactive remedies where there is no prior court adjudication upholding the challenged tax scheme. An example of where the State could not claim a reliance on past case-law is found in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). In Kuhnlein, this Court addressed whether a new state statute which imposed an impact fee on cars purchased or titled in other states and subsequently registered in Florida by persons having or establishing residence in Florida violated the Commerce Clause. Id. at 719. This Court held that the Florida impact fee resulted in discrimination against out-of-state economic interests, and thus, violated the Commerce Clause. Id. at 724. In considering the appropriate remedy, this Court found that under Kuhnlein's specific facts that the "only clear and certain remedy is a full refund to all who have paid this illegal tax." Id. at 726.[8] Because this Court was considering the validity of the impact fee statute for the first time, it is clear that the State did not have reliance interests which would

[8] 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 v. McKesson, 574 So.2d 114, 116 (Fla. 1991).

prevent a remedy to refund taxes collected before this Court declared the statute unconstitutional.

Turning to the certified question in the instant case, it is clear that McKesson and Kuhnlein did not overrule or abrogate Gulesian. Under the federal cases discussed, the decision of whether to apply a Supreme Court's rule of law striking a state tax statute unconstitutional is a question of federal law. Smith, and James B. Beam. Furthermore, based on federal-state comity issues, state courts are free to formulate the "clear and certain remedy" which complies with federal due process rights. The state courts, however, may consider any procedural bars or reliance interests, which prevent retroactive remedies or relief, such as granting tax refunds. Under Gulesian and other state cases, the Florida courts may consider the taxing authorities' reliance on past case law upholding tax statutes, which are later found invalid, as precluding retroactive relief in some cases. Florida, however, has recognized that in the absence of a procedural bar or reliance interest, the granting of tax refunds for illegally collected taxes is one of several proper remedies. Kuhnlein. Based on the foregoing, it is clear that Gulesian, which denied tax refunds based on the school board's good faith reliance on a federal district court's

decision and a state statute, is in line with McKesson, James Beam and Smith, which allow a state court to formulate a state remedy granting relief, and consider any procedural bars or reliance interests which prevent retroactive relief. Furthermore, Kuhnlein does not overrule Gulesian because, unlike Gulesian, the State in Kuhnlein did not have any reliance interests that prevented a retroactive remedy. Therefore, this Court should answer the certified question in the affirmative, and reaffirm Gulesian.[9]

II WHETHER THE DISTRICT COURT ERRED WHEN IT INTERPRETED THIS COURT'S DECISION IN KUHNLEIN V. DEPARTMENT OF REVENUE, 662 So. 2d 308 (Fla. 1995), AS HOLDING THAT POSTJUDGMENT INTEREST WAS AWARDABLE IN TAX REFUND CASES?

The District Court of Appeal did not certify the question of whether to award postjudgment interest in the instant case. See Dryden v. Madison County, 21 Fla. Law Weekly at D588. However, Petitioners have made postjudgment interest an issue before this Court[10] in such a manner as to involve the State. This State,

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[9] The State's amicus brief does not express an opinion as to whether the facts of this case fit within the doctrine of "good faith" as established by Greer and applied in Gulesian and Coe.

[10] While the Petitioners state that "the case does not involve taxes or special statutes which govern refunds of same, such as section 215.26, Florida Statutes (1995)," they contend that postjudgment interest is "due under section 55.03" because section 55.03 "does not exempt the state or counties." . See Petitioner's brief at 13, 17, and 43 (emphasis supplied).

however, will address this issue because it seriously affects the proper functioning of government. Thus, the State presents the following discussion on the issue of postjudgment interest.

Since this Court's decision Kuhnlein v. Department of Revenue, 662 So. 2d 308 (Fla. 1995)(Kuhnlein II), there has been confusion among the courts[11] concerning the question of whether this Court overruled years of precedents holding that interest may not be awarded in a tax refund case. Further, it is unclear whether this Court in Kuhnlein II has waived the State's sovereign immunity preventing an award of interest in a tax refund case, in the absence of an express textual statement from the legislature that the State and its political subdivisions are

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[11] In addition to the case under review, the First District Court of Appeal recently ruled in Department of Revenue v. Brock, ___ So. 2d ___ , 21 Fla. Law Weekly D1120 (Fla. 1st DCA May 7, 1996), that the Department of Revenue must now start paying post judgment interest, while **not** having to pay prejudgment interest, on all State tax refund cases, citing to Palm Beach County v. Town of Palm Beach, 579 So. 2d 719 (Fla. 1991). However, upon remand from Kuhnlein, the circuit court **denied** the class plaintiffs any postjudgment interest stating "[t]here can be no award of postjudgment interest because there is, as this [Circuit] Court has already ruled, No 'inequitable circumstances' that would permit such an award." Kuhnlein v. Department of Revenue, 9th Jud. Cir., Case No. CI92-6224, Final Order on class Plaintiffs' Motion for Determination of Post Judgment Interest, at p.3, Jan. 30, 1996. The case is now pending on appeal before the Fifth District Court of Appeal. Kuhnlein v. Department of Revenue, Fla. 5th DCA, Case No. 96-378.

subject to postjudgment interest in tax refund cases. This Court expressly affirmed the denial of prejudgment interest in Kuhnlein II by holding "that there is no entitlement to prejudgment interest in this action to recover a tax refund." Id. (citations omitted). However, this Court did not clearly reaffirm its past case-law denying postjudgment interest in tax refund cases by holding:

> We answer the question in respect to postjudgment interest by determining that there is not a final money judgment, and therefore there is not at present an entitlement to postjudgment interest in this case under these circumstances.

Id. (citing, Flack v. Graham, 461 So. 2d 82 (Fla. 1982); State ex rel. Four-Fifty Two-Thirty Corp., 322 So 2d. 525, 529 (Fla. 1975); and, Mailman v. Green, 111 So. 2d 267 (Fla. 1959)).

This Court's holding that because there was no final money judgment "there is not at present an entitlement to postjudgment interest in this case under these circumstances" has created confusion as to whether postjudgment interest is awardable in tax refund cases.

The cases this Court cited to support its holding expressly deny the award of interest in tax refund cases. The language in Kuhnlein II, however, implies that postjudgment interest may be awarded upon the trial court's entering of a final money

judgment. Consequently, there is confusion as to whether Kuhnlein II changed the long held policy of not awarding postjudgment interest in tax refund cases. In order to change this well established principle of law, this Court would need to make an express declaration that postjudgment interest is available in tax refund cases and the reasons why post judgment interest is available in tax refund cases.

The State disagrees with the courts' interpretation that Kuhnlein II authorizes the awarding of interest on tax refunds for two reasons. The first reason that interest may not be awarded in tax refund cases pursuant to chapter 55 is that tax refunds are not money judgments, and section 215.26, Florida Statutes (1995), the exclusive procedure for tax refunds, does not provide for interest awards. The second reason that interest may not be awarded in tax refund cases is that the State has not waived its sovereign immunity to allow an interest award. Based on the foregoing, the State requests that this Court use the instant case to restate its well established position that generally interest is not awardable in tax refund cases.

A. TAX REFUNDS ARE NOT MONEY JUDGMENTS.

1. A court may not award interest against the State in tax refund cases pursuant to chapter 55 because tax refunds are not money judgments.

The Florida courts have consistently held that tax refunds are not money judgments. See Mailman v. Green, 111 So.2d 267, 268 (1959), (holding that estate's application for a tax refund was "not an action against the state for recovery of money . . .";see also Four-Fifty Two-Thirty Corporation, 322 So.2d at 530; Hansen v. Port Everglades Steel Corp., 155 So.2d 387, 389 n.1 (Fla. 2d DCA 1963)(holding that ."[t]he decree in this [ad valorem] suit did not amount to or contain a money judgment," even though the Comptroller was ordered to direct Broward County to refund the money paid under protest); and Wilson v. Woodward, 602 So. 2d 545, 546 (Fla. 2nd DCA 1991) (stating that "order directing the clerk to disburse funds from the registry of the court to Woodward is not a money judgment . . ."). The conclusion that a tax refund is not a money judgment is firmly based on the historical view of taxes. Justice Oliver Wendell Holmes, Jr. wrote that, "Taxes are what we pay for civilized society." Compania General De Tobacos De Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100, 48 S.Ct. 100 (1927). Following Justice Holmes' characterization of taxes, this Court has recognized that the payment of a tax is an obligation not based on contract, and is not a debt in the usual sense of the word. St. Lucie Estates v. Ashley, 105 Fla. 534, 141 So. 738, 739

(1932).

Section 55.01, Florida Statutes (1995), provides that generally, a money judgment may be entered where a party recovers "a sum of money, the amount to which he or she is entitled" and "without any distinction being therein made as to whether such sum is recovered by way of debt or damages." If the law does not view a tax payment as a debt or an obligation required based on a contract, then the converse is true that a government's refund of tax money is not the payment of a debt or payment of damages for a breach of contract. A tax refund is rather the return of money overpaid. Because a tax refund is not the government paying a debt or damages, an order granting a tax refund is not a "money judgment" as defined under section 55.01. Consequently, section 55.03, Florida Statutes (1995), which outlines the procedure for the Comptroller to follow in establishing the amount of interest to be paid on judgments, is not applicable to tax refunds.

The conclusion that a tax refund is not a "money judgment" is further supported by comparing tax refunds with instances where the courts have awarded interest against the State pursuant to section 55.03, Florida Statutes.

In cases awarding interest against the State, the facts show that the courts entered an award for payment of a debt or

damages. See Treadway v. Terrell, 158 So. 2d 512, 518-19 (Fla. 1935)(awarding interest where state agency breached contract by failing to pay for work done); Florida Livestock Board v. Gladden, 86 So. 2d 812 (Fla. 1956)(awarding interest where state agency failed to timely pay plaintiff for destruction of his property pursuant to state agency's order); Roberts v. Askew, 260 So. 2d 492 (Fla. 1972)(holding that plaintiffs who brought quiet title action against state agency and obtained a money judgment were entitled to interest on money judgment at lawful rate from date of its entry until paid); and Palm Beach County v. Town of Palm Beach, 579 So. 2d 719 (Fla.1991)(awarding interest where issue of county's liability established based on the wrongful withholding of tax moneys from town). All of these decisions involve claims where courts have entered money awards to address either the State's non-payment of a debt or damages caused by a tort or breach of contract.

In contrast, a tax refund is neither a payment of a debt nor an award for damages, but rather the return of overpaid funds. Because a tax refund does not represent payment of a debt or damages, it is clear that tax refunds are not "judgments" subject to chapter 55, Florida Statutes. Thus, tax refunds are not subject to the interest provisions of section 55.03, Florida

Statutes.

2. Petitioners' reliance on Simpson v. Merrill, 234 So.2d 350 (Fla. 1970), which involved awarding costs against the State, does not support the proposition that interest may be awarded in tax refund cases.

Petitioners' reliance on Simpson v. Merrill, 234 So. 2d 350 (Fla. 1970), for the proposition that interest may be awarded in tax refund cases is misplaced. In Simpson, this Court addressed whether the district court of appeal erred in assessing costs against a state agency where the facts show that taxpayers challenged an assessment against their land, and the taxpayers received some of the relief sought. 234 So. 2d at 351. This Court found that section 57.041, Florida Statutes, "provides for legal costs by the party recovering the judgment in all cases except those specifically exempted", and that section 57.041 did not include an exception for the State. Id Consequently, this Court held that "[w]hen, through litigation, these [governmental] demands are determined to be unlawful, the government, like any other party, should be compelled to pay the costs of litigation." Id.

The petitioners' argument infers that because section 55.03, like the statute in Simpson, does not contain language excluding the State from interest awards, the State should be subject to

interest like any other party. The petitioners' argument is without merit because it is premised on the erroneous assumption that a tax refund is a "money judgment." As explained earlier, a tax refund is not a "money judgment", and thus, section 55.03 is not applicable to tax refunds. Because section 55.03 is not applicable to tax refunds, the petitioners cannot infer that this general section authorizes interest awards in tax refunds. Thus, the petitioners' reliance on Simpson is misplaced.

3. The District Court's apparent reliance on Palm Beach County v. Town of Palm Beach, 579 So.2d 719 (Fla. 1991), which involved the awarding of interest for a wrongful withholding of moneys, does not support the proposition that interest may be awarded in tax refund cases.

Any reliance on Palm Beach County v. Town of Palm Beach, 579 So. 2d 719 (Fla. 1991)[12] (Palm Beach II), for the proposition that postjudgment interest may be awarded against the State in a tax refund case is misplaced.[13] An examination of Palm Beach II shows that it did not consider the issue at hand, whether a trial

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[12] See, Dryden v. Madison County, 21 Fla. Law Weekly, at D588; and, State of Florida, Department of Revenue v. Brock, 21 Fla. Law Weekly at D1120.

[13] The State agrees with the petitioner's contention that the instant case does not involve taxes or special statutes which govern the same, such as section 215.26, Florida Statutes (1995). Petitioners' Initial Brief at 13.

court should grant postjudgment interest in a tax refund case. The facts in Palm Beach II show that Palm Beach County assessed ad valorem taxes pursuant to section 336.59, Florida Statutes (1983), for the purpose of maintaining roads and bridges.[14] Under the statute, a portion of the ad valorem taxes went from the County to the municipalities within the county. Id. at 719. The Town of Palm Beach sued Palm Beach County challenging the insufficiency of the county's levies and prevailed. Id. at 720. On appeal, the district court affirmed the trial court's conclusion that the county's levies were insufficient. Id at 720 (citing Palm Beach County v. Town of Palm Beach, 507 So. 2d 128, 130(Fla. 4th DCA 1986)(Palm Beach I)). On remand, the trial court entered a stipulated amount that the county was to pay to the municipality, but made no allowance for interest. Id On appeal, the district court affirmed the trial court, and certified the question of whether "a governmental entity [is] immune from the payment of postjudgment interest under the doctrine of sovereign immunity?" Id at 719-20.

This Court answered the certified question in the negative,

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[14] Section 336.59, Florida Statutes (1983), was repealed October 1, 1984.

and held that section 55.03 which "expressly provides for postjudgment interest without listing any exception to its application" applied to that case. Id at 720. This Court rejected the County's argument that it was protected from postjudgment interest by sovereign immunity. Specifically, this Court found that the question of governmental immunity from suit was resolved in Palm Beach I, and was not appealed, and thus, was not properly before the court. Id at 720. Further, this Court held that "[a]lthough in tort actions, the exercise of a purely governmental function may appropriately raise the defense of sovereign immunity from liability, it is not a defense to the award of interest where the county's liability has been determined." Id at 720 n. 3. Thus, this Court held that "[o]nce the governmental entity has fully litigated the issue of its immunity and has lost on the merits, we see no reason why it should be shielded from paying interest on the judgment simply because the prevailing party is another governmental entity." Id. at 721.

The Palm Beach II opinion does not overturn this Court's long-line of cases holding denying interest awards in tax refund cases. The Palm Beach II opinion, rather is consistent with this Court's decision to award interest against a governmental entity

when the facts show that government acted in a proprietary manner or when equitable considerations require.

First, the facts in Palm Beach II show that the county illegally withheld money from the municipality. Consequently, Palm Beach II involved a municipality's "tort" claim against the county. Under section 768.28, Florida Statutes, it is proper to award interest for tort claims; thus, the awarding of postjudgment interest based on the facts in Palm Beach II is in line with other cases involving the award of interest against the State for torts and contract breaches, i.e., Broward County v. Finlayson, 555 So. 2d 1211 (Fla. 1990), Roberts, supra, Florida Livestock Board, supra, and Treadway, supra.

After this Court determined that the issue was a tort matter to which interest could be awarded against a governmental body, this Court was correct in turning to section 55.03. Palm Beach County, 579 So. 2d, at 720. Next, the assessment of interest against the county in Palm Beach II is also consistent with the Mailman line of cases awarding interest where the facts show that there was a clear legal right to funds and an inequitable denial of the funds. The facts in Palm Beach II showed "deliberate acts on the part of the county to circumvent the tax-sharing mandate of section 336.59, Florida Statutes." 579 So. 2d, at 720.

Section 336.59 gave the Town of Palm Beach the clear legal right to funds collected by Palm Beach County. Because Palm Beach County deliberately tried to circumvent the tax sharing mandate of section 336.59, this Court properly awarded interest based on the County's "inequitable conduct." Thus, it is clear that the result in Palm Beach II is consistent with the Mailman line of cases.

In contrast to the facts in Palm Beach II, tax refund cases do not involve the State committing a "tort" against the taxpayer, the State breaching a contract with a taxpayer, or the State acting inequitably by wrongfully withholding tax refunds.

The State in collecting taxes, which are subsequently challenged, is not committing a "tort" or breaching a contract with the taxpayer. In fact, section 72.011(3), Florida Statutes, requires that a taxpayer contesting the legality of a tax, penalty, and accrued interest assessed by the Department of Revenue in circuit court must first pay the uncontested amount, and second, pay the disputed amount into court registry, or file a cash bond or surety for the amount of the contested assessment. This statutory requirement that taxpayer pay the tax before challenging the assessment or tax statute does not constitute a "tort" or contract breach, if a court subsequently invalidates

the tax.

Furthermore, absent the clear legal right to the refund, the Comptroller and Department of Revenue are not committing a "tort" or acting inequitably by denying a taxpayer's refund request based on the challenge that a taxing statute is invalid. Before a court rules that a taxing statute is invalid, the Comptroller and the Department of Revenue must follow the well established rule that the legislature's acts are presumed valid. See Maison Grande Condominium Ass'n, Inc. v. Dorten, Inc., 600 So.2d 463, 465 (Fla. 1992)(holding that "Florida law has long recognized 'that a statute found on the statute books must be presumed to be valid and given effect until it is judicially declared unconstitutional'")(quoting City of Sebring v. Wolf, 105 Fla. 516, 519, 141 So. 736, 737 (1932)). Consequently, it is clear the Comptroller and Department of Revenue are not acting inequitably by refusing to pay a taxpayer's initial request for a refund. Because considerations of "tort" and inequitable conduct generally do not apply in tax refund cases, the rule of law in Palm Beach II is not applicable. Thus, this Court should decline to extend Palm Beach II for the imposition of interest on tax

refund cases.[15]

B. SOVEREIGN IMMUNITY PREVENTS THE AWARD OF INTEREST IN TAX REFUND CASES, ABSENT A WAIVER.

1. Sovereign immunity prevents the award of interest against the State.

The principle of sovereign immunity is based on the broad grounds of fundamentals in government. State ex rel. Charlotte County v. Alford, 107 So.2d 27, 29 (Fla. 1958). In fact, the Florida Constitution has a specific provision which permits the legislature to waive the State's sovereign immunity. Art. X, section 13, Fla. Const.; see also Circuit Court of the Twelfth Judicial Circuit v. Department of Natural Resources, 339 So. 2d 1113, 1114-1115 (Fla. 1976)(citing Spangler v. Florida State Turnpike Authority, 106 So. 2d 421 (Fla. 1958); Hampton v. State Board of Education, 90 Fla. 88, 105 So. 323 (1925)).

Florida courts have explained that sovereign immunity's purpose is to protect from the government from encroachments on the public treasury, Jaar v. University of Miami 474 So. 2d 239, 245 (Fla. 3rd DCA), rev. denied, 484 So. 2d 10 (Fla. 1985)

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[15] If this Court chooses to affirm the district court in the instant case, then this Court should reverse the general language of the opinion and uphold the award of interest based upon Madison County having been shown to have factually engaged in "inequitable conduct" and that equitable grounds require the awarding of interest.

(citing Spangler, 106 So. 2d at 424), and provide for an orderly administration of government. Berek v. Metropolitan Dade County, 396 So. 2d 756 (Fla. 3rd DCA), app'd, 422 So. 2d 838 (Fla. 1981).

In furthering these public policies, this Court has recognized that sovereign immunity should be liberally construed[16], and that the legislature's statutory waiver of the State's sovereign immunity must be clear and unequivocal,[17] Rabideau v. State, 409 So. 2d 1045, 1046 (Fla. 1982). In addition, the courts have held that the statutes waiving sovereign immunity must read the narrowly and construed *strictly in favor* of the State. Tampa-Hillsborough County Expressway Authority v. K.E. Morris Alignment Service, Inc., 444 So. 2d 926, 928 (Fla. 1983); Carlile v. Game and Fresh Water Fish Commission,

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[16] State Road Department of Florida v. Tharp, 146 Fla. 745, 1 So. 2d 868, 869 (1941).

[17] The State suggests that the standard for a court finding that the legislature waived sovereign immunity matches the standard used by the United States Supreme Court when determining congressional abrogation or waiver of the states' Eleventh Amendment immunity; "a clear legislative statement" of a waiver. Seminole Tribe of Florida v. Florida, ___ U.S. ___, ___, 116 S.Ct. 1114, 1123 (1996); Blatchford v. Native Village of Noatak, 501 U.S. 775, 786, 111 S.Ct. 2578, 2584-2585 (1991); Dellmuth v. Muth, 491 U.S. 223, 227-233, 109 S.Ct. 2397, 2400-2403 (1989)(holding that Congress may waive the states' immunity "only by making its intention unmistakedly clear in the language of the statute.").

354 So. 2d 362 (Fla. 1977).

Consequently, the State's waiver of sovereign immunity is limited in its scope to the narrowest of interpretation and can be extended no further than the conditions and limitations prescribed by the legislature in its grant of consent. State ex rel. Florida Dry Cleaning and Laundry Board v. Atkinson, 136 Fla. 528, 188 So. 834, 838 (1939); Valdez v. State Road Department, 189 So. 2d at 824 (citation omitted).

Thus, in addressing sovereign immunity claims, this Court must determine: 1) whether the legislature expressly and unequivocally waived the State's sovereign immunity; and 2) if the waiver exists, the narrow scope of the waiver in light of the public policies of fiscal planning and orderly administration of government.

The law is clear that sovereign immunity prevents a court from awarding interest against the government unless the legislature consents to interest awards by statute, or where the state stipulates to interest awards in a lawful contract entered into by an executive officer. United States v. North Carolina, 136 U.S. 211, 216, 10 S.Ct. 920, 922 (1890); Treadway, supra; Flack, supra; State v. Family Bank of Hallandale, 623 So. 2d 474, 479 (Fla. 1993).

Florida recognizes three instances where the State has waived its sovereign immunity in the awarding of interest. First, the courts have allowed an interest award where the facts show that the legislature expressly and unequivocally waived the State's sovereign immunity. See section 220.723, Florida Statutes (1995)(providing interest for overpayment of corporate income tax refunds); and section 768.28(5), Florida Statutes (1995)(providing that State be subject to same claims as private parties in tort actions).

Second, interest is awarded where the legislature has authorized suits against a state agency without any limit as to the awarding of interest. See Treadway, 158 So. at 518 (holding that plaintiff could be awarded interest "[w]here there is statutory authority to sue a state is given, the implied immunity of the state from payment of interest upon obligations of the sovereign state may be waived or the payment of such interest may be impliedly authorized or assented to by the statute."); see also Florida Livestock Board, 86 So. 2d at 813 (holding that trial court properly awarded interest against state agency for value of plaintiff's hogs, which were destroyed pursuant to the agency's order to prevent the spread of disease, because the legislative statute creating the state agency provided the agency

with the right "to sue and be sued, as well as all other rights and immunities usually enjoyed by bodies corporate.").

Third, and finally, interest is awardable against the State when the facts show the state agency has breached a lawful contract, or that the State has stipulated to the award of interest. See Public Health Trust of Dade County v. State, Department of Management Services, 629 So. 2d 189 (Fla. 3rd DCA 1993)(holding sovereign immunity did not bar recovery of prejudgment interest on a successful action against the state in contract); see also City of Miami Beach v. Turchin, 641 So.2d 471, 472 (Fla. 3rd DCA 1994)(reversing trial court's order vacating an arbitrator's award of prejudgment interest where the facts showed that the municipality entered into a contract which stipulate that all claims would be decided by an arbitrator, and award of prejudgment interest issue was within the scope of the arbitrator's authority).

The Florida courts, however, have consistently denied the award of interest against the State where the facts show an absence of express authority for an interest award, absence of an implied authority to award interest, or an absence of the breach of a lawful contract. See Mailman, supra, (holding that taxpayer was not entitled to award of interest for amount of estate taxes

overpaid because taxpayer had no clear legal right to an award of interest where the facts show that the Comptroller timely complied with his duty and refunded the principal and did not inequitably withhold the principal); Four-Fifty Two-Thirty Corp., *supra* (holding that taxpayer was not entitled to interest on refund sought under sections 215.26 and 199.252, Florida Statutes, because the statutes did not expressly provide for interest); Flack, 461 So. 2d at 83-4 (holding that county judge, who had her salary withheld, was not entitled to interest on payment of her backpay where she had not shown a clear legal right to coerce the Comptroller to pay interest, and equitable considerations require payment of interest); State, Department of Transportation v. Bailey, 603 So.2d 1384 (Fla. 1st DCA 1992)(holding that award of prejudgment interest clearly erroneous under section 768.28(5), Florida Statutes, where statute waives sovereign immunity for tort claims, but statute specifically reserves sovereign immunity against award of prejudgment interest); Smith v. University Presbyterian Homes, Inc, 390 So.2d 79, 81 (Fla. 2d DCA 1980)(Justice Grimes, as a district court judge, writing for the court held that taxpayer not entitled to interest on refund because there is "no statutory authority for the allowance of interest on a tax refund"),

adopted, 408 So.2d 1039 (Fla. 1982); Department of Revenue v. Goembel, 382 So. 2d 783, 786 (Fla. 5th DCA 1980).

Thus, the law is clear that sovereign immunity prevents a court from awarding interest against the State, unless the legislature expressly waives the State's immunity, the legislature provides a statute to sue the state agency impliedly making the agency liable for interest, or the State enters into a contract stipulating or waiving its sovereign immunity to allow the award of interest.

Turning to the issue presented in the instant case, it is clear that sovereign immunity prevents the courts' awarding of post-judgment interest against the State in a tax refund case, absent an express or implied waiver of sovereign immunity. An examination of the Florida statutes and applicable case-law shows that the legislature has not expressly or implied waived the State's sovereign immunity in order to permit the awarding of post-judgment interest in a tax refund case.

In tax cases, this Court has held that the State's waiver of sovereign immunity must be express. See Dickinson v. City of Tallahassee, 325 So. 2d 1, 3 (Fla. 1975)(holding that State did not waive its sovereign immunity in order to allow taxation by the City of Tallahassee); Alford, 107 So.2d at 29 (holding that

exemption of state lands from ad valorem taxation is based "upon broad grounds of fundamentals in government.")

Section 215.26(4), Florida Statutes (1995), provides that it is the "exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury." A reading of section 215.26 reveals that the statute does not contain a provision for interest awards in tax refund cases. Furthermore, section 215.26(6) provides that a taxpayer may contest a denial of a tax refund, interest, or penalty paid under a section or chapter specified in section 72.011(1) pursuant to the provisions of section 72.011. Like section 215.26, a reading of section 72.011 shows that the statute does not contain any provision for interest award on a tax refund.

Because the Florida legislature has not expressly and unequivocally waived the State's sovereign immunity, it is clear that the courts may not waive the State's sovereign immunity and award interest in tax refund cases.

The conclusion that the Florida Legislature has not expressly waived the State's sovereign immunity in order to permit the award of interest in tax refund cases is supported by a reading of sections 220.723 and 768.28(5), Florida Statutes

(1995).[18] Section 220.723 provides that interest shall be awarded in a tax refund when a corporation overpays its corporate income tax. Further, section 768.28(5) provides that in tort cases, the State can be liable to the same extent as private individuals under like circumstances.

In both sections 220.723 and 768.28(5), the legislature has expressly waived its sovereign immunity in order to allow the awarding of interest against the State.

In contrast, sections 215.26 and 72.011 do not contain a legislative waiver of its sovereign immunity in order to allow the award of interest. Clearly, if the Florida legislature is sophisticated enough to expressly permit interest awards for corporate income tax refunds and tort cases, then the exclusion of interest awards for general tax refunds is not by accident.

An examination of the Florida Statutes further shows that the legislature has not given an implied waiver of the State's sovereign immunity to permit interest awards in tax refund cases. Florida courts finding an implied waiver of sovereign immunity to award interest against the State have focused on two facts:

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[18] See also, Section 197.432(1), Fla. Stat., dealing with the ad valorem taxes, which provides that interest is to be earned on void tax certificates from the date of purchase "until the date the refund is ordered."

first, the legislature's creation of a state agency that acts as a private party; and second, the legislative statute giving the state agency the rights and responsibilities enjoyed by private entities. Treadway and Florida Livestock Board.

Section 20.21, Florida Statutes (1995), which creates the Department of Revenue, sets out the agency's responsibilities to carry out relevant portions of ad valorem law, plan, organize, administer, and control tax auditing activities, provide tax collection and enforcement, provide information systems and services for taxpayer registration, provide taxpayer assistance and render advice about tax matters, and provide for child support enforcement. Sections 20.21(2)(b)-(h). Section 20.21, however, does not give the Department of Revenue the right and responsibilities to be treated as a private party, like the state agency in Florida Livestock Board. In addition, the duties outlined in section 20.21 are not analogous to actions in the private sector, such as permitting the state agency to enter into contracts with private parties, like the state agency in Treadway.

In fact, the Department of Revenue's duty to assess and collect taxes is, without question, strictly a sovereign function which is not analogous to any function performed in the private

sector. Furthermore, an examination of sections 215.26 and 72.011(1) show that the statutes do not provide the Department of Revenue with the rights and responsibilities of a private corporation. Because the legislature did not create the Department of Revenue to act like a private entity and did not give it the rights and responsibilities of a private entity, it is clear that the legislature has not given an implied waiver of sovereign immunity in order to allow an interest award on tax refunds.

2. Public policy reasons support the conclusion that courts should not award interest in tax refund cases.

It is well established that a statute is presumed correct until a final appellate decision. Deltona Corp., v. Bailey, 336 So. 2d 1163, 1166 (Fla. 1976); see also Peoples Bank, etc., State, Department of Banking and Finance, 395 So.2d 521, 524 (Fla. 1981). Further, state officers and agencies must presume legislation affecting their duties is valid. Department of Education v. Lewis, 416 So.2d 455, 458 (Fla. 1982). Applying these rules of law to the issue of whether to award postjudgment interest in tax refund cases, it becomes clear that awarding interest in tax refund cases will "chill" state officers from upholding and enforcing state statutes. This "chilling" effect

may be seen in two factual scenarios faced by the Department of Revenue when a trial court's ruling that a tax statute is unconstitutional. In the first scenario, if the Department appeals the trial court's ruling, continues to collect the taxes based on the presumptively valid statute and loses on appeal, then the Department must pay interest from the date of the trial court's judgment; or 2) if the Department appeals the trial court's ruling, but discontinues its tax collection based on the ruling and wins on appeal, then the Department has the difficult task of collecting taxes owed between the trial court's erroneous ruling and the final appellate court ruling.

The Department is faced with a difficult choice between its responsibilities of upholding the state statute and its duty to collect funds. Consequently, the awarding of interest in tax refund cases will result in officers for the Department of Revenue State being "chilled" in the exercise of their functions.

The State is not the first to recognize this "chilling" effect. In Simpson v. Merrill, *supra*. Chief Justice Ervin, while agreeing with this Court's opinion that costs could be assessed against the State, further stated:

> Many officers and governmental agencies operate on very limited itemized budgets. Not infrequently in the normal exercise of their functions they have honest

> disputes with members of the public and litigation will ensue. Public officers and governmental agencies should not be made timorous in the forthright administration of their duties by the fear that they may be losing parties in such litigation and that the ensuing court costs could seriously jeopardize normal discharge of the duties of such officers and agencies by reducing their operating budgets beyond the point where they could pay their normal salaries and expenses. Litigation costs, including costs of appeals, can in some cases be quite expensive.

Simpson, 234 So. 2d at 353 (C.J. Ervin, concurring)(emphasis supplied). Chief Justice Ervin's concurring opinion demonstrates that without legislative appropriation for costs, the blanket awarding of costs against the State could lead to state officers being "timorous" in administering their duties. Similarly, without legislative appropriation for interest, the officers for the Department of Revenue could become "timorous" in administering their duties because of the fear that postjudgment interest may be awarded against the State, if the department challenged a trial court's overturning a presumptively valid tax statute.

In addition to the disruption of government administration, the awarding of interest in tax refund cases could cause budgetary problems. Without a legislative authorization for the awarding of postjudgment interest and appropriation of funds to pay interest on tax refunds, the State may find itself with

budgetary problems which disrupt government services. Thus, Chief Justice Ervin's warning in Simpson that awards from the public treasury should be tied to specific legislative appropriations should be followed. Clearly, interest awards will come out of the State's operating budget. The legislature in providing appropriations for the coming budget year will be forced to speculate about the amount of interest that the courts may award in the coming year in tax refund cases. Such speculation will certainly hamper the legislature's ability to realistically set a budget.

The requirement that the legislature waive the State's sovereign immunity to allow the awarding of interest is based on the fact only the legislature holds the purse strings. Chiles v. Children A,B,C,D,E, and F, 589 So. 2d 260, 265 (Fla. 1991)(holding "that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes."). Presumably, the legislature will waive its sovereign immunity to undertake only those financial obligations that it thinks the State can afford. If the legislature thinks that the State cannot financially afford to pay interest on tax refunds, then the legislature will not undertake that financial obligation by keeping its sovereign immunity. However, if this

Court permits the awarding of interest in the absence of a sovereign immunity waiver, then this Court may well be implicating the legislature's responsibilities of determining the extent of the State's obligations. Thus, an interest award absent a sovereign immunity waiver implicates the separation of powers doctrine. Based on the considerations of fiscal planning and sovereign immunity, this Court should not permit the award of interest in tax refund absent a sovereign immunity waiver.

In sum, this Court should decline to award postjudgment interest in tax refund cases for two reasons: First, interest should not be awarded in tax refund cases because the a tax refund is not a money judgment, and thus, section 55.03, which awards interest on judgments, is not applicable to tax refunds. Second, an examination of Florida Statutes and case-law shows that the legislature has not expressly and unequivocally waived the State's sovereign immunity in order to allow the awarding of interest in tax refund cases.

CONCLUSION

The State respectfully requests that this Honorable Court answer the certified question in the affirmative, and deny the awarding of postjudgment interest in tax refund cases.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to the attached list of attorneys of record this 17th day of June 1996.

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