ORIGINAL

SUPREME COURT OF FLORIDA

DAVID KUHNLEIN and **SCOTT ENOS,**
BARBARA BLANCHARD, JOEL CURRAN,
and **KATHERINE CURRAN**, both
individually and on behalf of
all others similarly situated,

Appellants,

vs. Case No. 88,266

FLORIDA DEPARTMENT OF REVENUE;
et al.,

Appellees.
_____/

APPELLEES' ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

The Appellees generally accept the State of the Case and Facts as written by the Appellants. Appellees do object to certain statements made on page 5 as both misleading, outside the scope of the record and not addressed by the trial court. The import of the Appellants statement is that the State is refusing to refund monies to approximately 27,500 persons and that the State will get to keep this unrefunded money. The Appellants have not told the entire story. As documented in the Notice of Filing, part of Appellants' Appendix "A," the 27,500 figure includes 17,500 whose refunds are not yet authorized due to a number of reasons and approximately 10,000 whose authorized checks have been returned as undeliverable. The State is working on the 17,500 to see if refunds are authorized. The State is also attempting to relocate and mail the nearly 10,000 of returned checks. However, if those checks are not deliverable, the money will not flow to any residual, but will be considered "abandoned" funds and come under the provisions of Section 717.123, Florida Statutes. The funds will always remain the property of the rightful owner.

What the Appellants are attempting to do, without ever bring the matter to the attention of the circuit court, is have this Court make a factual ruling that the State is acting improperly. This is far outside the scope of this appeal of the circuit court's order. If Appellants believe the State has acted improperly, they can submit the matter to the circuit court.

STATEMENT OF THE ISSUE

WHETHER POST JUDGMENT INTEREST IS TO BE ROUTINELY AWARDED IN REFUND CASES; WHETHER POST JUDGMENT INTEREST CAN BE AWARDED IN TAX REFUND CASES WHERE PREJUDGMENT INTEREST CANNOT BE AWARDED AND THERE IS NO EXPRESS WAIVER OF THE STATE'S IMMUNITY IN TAX REFUND CASES

SUMMARY OF ARGUMENT

This Court should decline to award postjudgment interest in tax refund cases for these reasons:

First, interest should not be awarded in tax refund cases because a tax refund is not a money judgment. Section 55.03, Florida Statutes, which awards interest on judgments, is not applicable to tax refunds because orders directing a tax refund is not a money judgment.

Second, an examination of Florida Statutes and case-law indicates 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. There is no express mention whatsoever in Section 55.03, Florida Statutes, that the Legislature has waived the State's immunity in tax refund cases and opened the State's Treasury to the payment of postjudgment interest in tax refund cases. There exists, as this Court has found on two separate occasions, that Section 215.26, Florida Statutes, the State's refund statute, does not authorize the payment of any form of interest even though it authorizes the refunding of monies paid into the State Treasury. Furthermore, in light of the Legislature's express waiver of interest in corporate income tax cases in Section 220.723, Florida Statutes, it is inconsistent to find a waiver of immunity in all tax refund cases based upon

the lack of express language in Section 55.03, Florida Statutes. The Legislature is fully aware of how, and under what circumstance, to permit interest on corporate income tax. If the Legislature intended to permit such a waive on all other taxes it would have specifically provided for such interest on other tax refunds. This all the more compelling for the fact that the waiver of the payment of interest on corporate income tax was first enacted in 1971, over 100 years after the first enactment of the predecessor to Section 55.03, Florida Statutes.

Finally, for policy and fiscal concerns, this Court should not accept Appellants' contention that this Court overruled more than 50 years of judicial precedence in Kuhnlein II by prohibiting prejudgment interest and now allowing postjudgment interest. It make no fiscal sense to deny one but permit the other.

The past law of denying both prejudgment and postjudgment interest in only tax refund cases has withstood the test of time. Governments should not be fiscally punished for passing tax laws or administering those tax laws. The payment of interest in those circumstances results in a situation that allows "damages" to be awarded against the State. The exception stated in Mailman v. Green, 111 So. 2d 267 (Fla. 1959) has served, and will continue to serve, the public well. Thus, where there is a clear legal duty to pay a refund has been established by court order from the highest level of appeal, interest may be awarded if the payment of the refund is unreasonably withheld from the taxpayer. However, in this case, the State has not withheld the payment of the refund to the taxpayers. This Court should adhere to this policy because the burden of paying postjudgment interest will be borne by the taxpayers of the State to the detriment of valuable State programs.

ARGUMENT

Since this Court's decision Kuhnlein v. Department of Revenue, 662 So. 2d 308 (Fla. 1995)(Kuhnlein II), there has been confusion among the lower courts concerning the question of whether this Court overruled years of judicial precedents holding that interest may not be awarded in a tax refund case. Further, it is unclear whether this Court in Kuhnlein II waived the State's sovereign immunity, thereby providing 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 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 statement "there [was] no final money judgment, and therefore there is not at present an entitlement to postjudgment interest in this case under these circumstances" has created confusion amongst the lower courts as to whether postjudgment interest is to be routinely awarded in tax refund cases. The cases this Court cited to support its holding expressly deny the award of interest, all interest, in tax refund cases in the absence of some "inequitable conduct or circumstance" by the governmental unit. The language in Kuhnlein II, however, implies that

postjudgment interest may be awarded upon the trial court's entering an order of refund without a ruling of inequitable conduct by the State.

Consequently, there is confusion as to whether this Court in Kuhnlein II receded from the long held policy of not awarding postjudgment interest in tax refund cases. This Court should make an express declaration clarifying its position on awarding postjudgment interest in tax refund cases and the reasons why post judgment interest would be available in tax refund cases.

I POSTJUDGMENT INTEREST

Due to this confusion, there is a need to revisit the very nature of interest and when it may be awarded. Interest, as this Court has so clearly ruled, is defined as the compensation allowed by law for the use or detention of money; interest is merely another element of **pecuniary damages**. Florida Steel Corp. v. Adaptable Developments, Inc., 503 So. 2d 1232, 1236 (Fla. 1986); Argonaut Insurance Co. v. May Plumbing Co., 474 So. 2d 212, 214 (Fla. 1985).[1/]

At common law, judgments, no matter what the cause of action, did not bear interest. Perkins v. Fourniquet, 55 U.S. (14 How.) 328 (1852). Interest rests only upon some statutory provision permitting it. Washington & Georgetown Railroad Company v. Harmon's Administrator, 147 U.S. 571, 584-585 (1893). That has long remained the holding of the United States Supreme Court. See Pierce v. United States, 255 U.S. 398, 406 (1921); Kaiser Aluminum & Chemical Corp. V. Bonjorno, 494 U.S. 827, 840 (1990). See also, Whithurst v. Camp, 21 Fla.

[1/] See also Peavy v. Dyer, 605 So. 2d 1330, 1332 (Fla. 5th DCA 1992), where the District Court stated the following:

> Once this element of damages is **awarded in the final judgment**, prejudgment interest, like all other elements of damages, becomes part of a single total sum adjudicated to be due and owing. (e.s.)

L. Weekly D1831 (Fla. 1st DCA August 14, 1996) [Postjudgment interest did not exist at common law and is solely a mater of legislative creation.] Therefore, only if the Florida Legislature has enacted a statute specifically requiring the State to pay interest, can any interest, prejudgment or postjudgment, be awarded in a tax refund case.

> Section 55.03(1),Florida Statutes, states, in pertinent part:
>
> A judgment or decree entered on or after October 1, 1981, shall bear interest at the rate of 12 percent a year unless the judgment or decree is rendered on a written contract or obligation providing interest at a lesser rate, . . .

There is nothing in the statute that mentions its applicability to the State in general, and to tax refunds in specific.[2]/ this statute stands for when there is a money judgment, postjudgment interest is to be awarded. This rule of law also applies to the State where the State is involved in activities which result in money judgments.

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

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[2]/ When used in the general concept, this Court's holdings on statutory construction in State v. Jett, 626 So. 2d 691 (Fla.1993), City of Miami Beach v. Galbut, 626 So. 2d 192 (Fla. 1993), and Holly v. Auld, 450 So. 2d 217 (Fla. 1984), that an unambiguous statute is not to be judicially altered, is the law of the State. However, there is a major exception to this general rule on statutory construction. That exception exists when a party seeks to have a general statute applied against the State and the effect will be a drain on the funds held in the State's Treasury. In that case, the law of sovereign immunity takes precedence over the above-discussed general rule of statutory construction. See, State ex rel. Davis v. Love, 99 Fla. 333, 126 So. 374, 377-381 (1930).

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 was established, based on the wrongful withholding of funds from the 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.

The waiver of the State's immunity must be express.[3]/ See Dickinson v. City of Tallahassee, 325 So. 2d 1, 3 (Fla. 1975) (State did not waive its immunity so as to be taxed by the City of Tallahassee); State ex rel. Charlotte County v. Alford, 107 So. 2d 27, 29 (Fla. 1958) (The legislative act did not subject the State's land to ad valorem taxation). It is not as if the Legislature does not know how to create a waiver and has not done so; the Legislature has created waivers that allow the payment of interest. The Legislature has expressly authorized the payment of interest on its debts in at least two circumstances. See Section 215.422(3)(b), Florida Statutes. (interest to be paid to vendors if the State's bills are not timely paid) and Section 220.723, Florida Statutes. (interest to be paid on corporate income tax overpayments). BOTH of these legislative waivers were enacted AFTER the enactment of Section 55.03, Florida Statutes. If, as Appellants continue to argue, that Section 55.03 automatically applies to the State, why would there have been a need to create the two interest statutes? Because the Legislature knew

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[3]/ See Section 196.199(4), Florida Statutes, expressly waiving immunity from taxation to certain government-owned lands. See, e.g., Capital City Country Club v. Tucker, 613 So. 2d 448 (Fla. 1993).

that orders of refunds are not money judgments, Section 55.03, Florida Statutes, did not apply to such orders.

II. NO INTEREST IS TO BE AWARDED IN A TAX REFUND CASE

The State disagrees with the Appellants' interpretation that Kuhnlein II authorizes the awarding of interest on tax refunds for two reasons. The first reason is that interest may not be awarded in tax refund cases pursuant to Chapter 55, Florida Statutes, because tax refunds are not money judgments and Section 215.26, Florida Statutes (1995), the exclusive procedure for tax refunds, does not provide for an award of interest. 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 any interest is not awardable in tax refund cases.

A. 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 was 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, 105 (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 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; 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 to the State Treasury. 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, Florida Statutes. 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. See Pan-Am Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984), and Treadway v. Terrell, 117 Fla. 838, 158 So. 512 (1935) (Contracts), Florida Livestock Board v. Gladden, 86 So. 2d 812 (Fla. 1956) (tort injury), Roberts

v. Askew, 260 So. 2d 492 (Fla. 1972) (business dealings like a private party - real estate). Even cases like Palm Beach County v. Town of Palm Beach, 597 So. 2d 719 (Fla. 1991)(wrongful withholding of tax moneys from town), are money judgments.

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.

Appellants' reliance, as well as some district court of appeals' reliance, on Palm Beach County v. Town of Palm Beach, 579 So. 2d 719 (Fla. 1991)[4]/ (Palm Beach II), must be carefully examined. Because a "tax" was involved in Palm Beach II, Appellants have distorted the meaning of this Court's holdings and reasoning. An examination of Palm Beach II shows that it did not consider the issue at hand (whether a trial court should grant postjudgment interest in a tax refund case) in any manner. 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.[5]/ 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.

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[4]/ See, Dryden v. Madison County, 21 Fla. Law Weekly D587, D588 (Fla. 1st DCA March 5, 1996), review pending, FSC, Case No. 87,594; and, State of Florida, Department of Revenue v. Brock, 21 Fla. Law Weekly D1120 (Fla. 1st DCA May 7, 1996), review pending, FCS, Case No. 88,434.

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

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, and held that Section 55.03, Florida Statutes, 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, Florida Statutes. 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. See Department of Revenue v. Nu-Life Health and Fitness Center, 623 So. 2d 747 (Fla. 1st DCA 1992). 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. "Clear legal right," in the case of a tax refund, can only come after the litigation has reached its final conclusion. As the Court stated in Mailman:

> To repeat, the **amount ultimately to be paid was throughout the litigation in doubt**. Whether the Comptroller should refund any or all of it **could not have been divined by that officer** and *that being the case*, we have found no room for the play of equitable principles relative to unjust enrichment of the state at the expense of its citizens, or failure of the state to deal fairly with them.

Id., at 269. It is only after all the doubt is removed can interest even be considered.

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 were 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.

Appellants' 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, Florida Statutes, 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 Appellants' argument infers that because Section 55.03, Florida Statutes, 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, Florida Statutes, 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.

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) (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[6], and that the legislature's statutory waiver of the State's sovereign

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

immunity must be clear and unequivocal,[7]/ 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, 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

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[7]/ The State would assert to this Court that the test for finding a waiver of the State's immunity under Florida be no less rigorous that than the standard used by the United States Supreme Court, "express and textual". 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."). See also, Alford, supra.

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).

The Appellees 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. Appellants still do not recognize that this Court made two holdings in Mailman, supra. First, the Court specifically ruled that neither Section 198.29, Florida Statutes (the law under consideration there) nor Section 215.26, Florida Statutes, have made "no provision for payment of interest on refunded taxes." Mailman, 111 So. 2d, at 269. Secondly, this Court held that a 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. That theory of law has gone on unaltered by this Court. See 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 back pay 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); and Department of Revenue v. Goembel, 382 So. 2d 783, 786 (Fla. 5th DCA 1980).

Thus, the law is clear. Sovereign immunity prevents a court from awarding interest against the State, unless the Florida Legislature: (1) Expressly waives the State's immunity; (2) Provides a statute to sue the state agency impliedly making the agency liable for interest; or (3) 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, Florida Statutes, reveals that the statute does not contain a provision for interest awards in tax refund cases. Mailman, 111 So. 2d at 269; Four-Fifty Two-Thirty Corp., supra Furthermore, Section 215.26(6), Florida Statutes, 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), Florida Statutes, pursuant to the provisions of Section 72.011, Florida Statutes. Like Section 215.26, Florida Statutes, a reading of Section 72.011, Florida Statutes, shows that the statute does not contain any provision for interest award on a tax refund.

Section 220.723, Florida Statutes, does provide for the waiver of the payment of interest in corporate income tax cases. The enactment of Section 220.723, first enacted in 1971, is far later in time to the enactment and long number of amendments to Section 55.03, Florida Statutes. If Section 55.03 intended to always waive interest payment by the State, why was Section 220.723 necessary? Section 220.723, Florida Statutes, was necessary because the Legislature had never before permitted the payment of interest on tax refunds. The Legislature carved out the narrow exception for corporate income taxes only. The Legislature left intact the immunity for the payment of interest on other tax refund cases.

Because the Florida legislature has not expressly and unequivocally waived the State's sovereign immunity, Alford, supra, 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, Florida Statutes, and 768.28(5), Florida Statutes (1995).[8]/ As stated above, 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), Florida Statutes, 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), , Florida Statutes, the legislature has expressly waived its sovereign immunity in order to allow the awarding of interest against the State. In contrast, Section 215.26, Florida Statutes, does 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: 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.

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[8]/ See also, Section 197.432(1), Florida Statutes, 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."

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), Florida Statutes. Section 20.21, Florida Statutes, 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, Florida Statutes, 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), Florida Statutes, 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)(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, Florida Statutes, 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.

THE MAILMAN EXCEPTION TO THE NONPAYMENT OF INTEREST SERVES THE PUBLIC WELL

This Court's decision in Mailman v. Green, 111 So. 2d 267 (Fla. 1959) is the case that sets the standard for governmental officials and allows the awarding of interest where the government official has acted improperly. In Mailman, the estate of the deceased filed papers with and paid the estate taxes due to the United States Government. Id., 111 So. 2d at 267-268. The estate paid the Comptroller the State's proper share of estate taxes on the percentage due the Federal Government. Id., at 268. For reasons not explained in the Opinion, the estate challenged the estate taxes due the Federal Government. Id. Eventually, the U.S. Tax Court ruled that there had been an overpayment of taxes by the estate and, from the information present, determined the correct amount due the State of Florida. Id. The estate then made a demand on the Comptroller for a refund of the overpayment of the estate taxes, as permitted by Section 198.29, Florida Statutes. (1959). Interest on that amount for the time the State had the overpayment was also requested. Id. The Comptroller refunded the principal amount but refused to pay the demanded interest to the estate. The estate then brought a mandamus action against the Comptroller in an attempt to compel the payment of interest.

This Court in Mailman began its legal discussion by looking to the statutes to see if the Legislature had waived the State's immunity and authorized the payment of interest on the refund of estate taxes. The Court could find neither general authorization nor specific authorization under Section 198.29 or Section 215.26, Florida Statutes. Mailman at 268-269. The Court, in dicta, then discussed the legal situation, or dilemma, faced by the Comptroller because of the absence of statutes. The Court made the following statements:

> It is plain that the actions of the Comptroller with references to the handling of the fund in question were ancillary to the actions, legislative and judicial, of the Federal government. The Congress controlled the life of the tax and the proportion of it to be received by the state while the Federal Tax Court adjudicated the dispute that arose about its amount.
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> We have already commented on the position this official in relation to the part played by the Federal government which convinces us that he was not free to exercise discretion or judgment on behalf of the state. Furthermore, we have not found authority in the statutes or decisions for the payment by the Comptroller of interest on the overpayment even had the amount been certain before entry of the judgment of the Federal Tax Court.
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> To repeat, the amount ultimately to be paid was throughout the litigation in doubt. Whether the Comptroller should refund any or all of it could not have been divined by that officer and *that being the case*, we have found no room for the play of equitable principles relative to unjust enrichment of the state at the expense of its citizens, or failure of the state to deal fairly with them.
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> * * * * *
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> . . . the Comptroller paid to petitioners the exact amount to which they were entitled. This, in our opinion, was all he was required to do and he could not have done it earlier.

Id., at 268-269. (e.s.) This Court, in refusing to order interest, did not permit the consideration of equitable principles. Id., at 269. This exact language has been repeated by this Court in State ex rel. Four-Fifty Two-Thirty Corp. v. Dickinson, supra.

The Mailman principal deserves to be the one and only exception to the awarding of interest in tax refund cases. It acts as a warning that interest will be awarded if the government ignores a clear legal duty to pay a refund. Yet it still protects the public fisc where there is a question of the legitimacy of the refund. Where there is a final determination by the highest court that a tax must be refunded, and then the public official still refuses to pay, interest will be awarded.

While the Mailman principles have not been used in a long time to address a tax issue,

that underlying principle has been utilized by the Court on a number of occasions. This Court looked to see if there was a clear legal duty before imposing certain financial penalties on the government. A recent case, In Re Forfeiture of 1976 Kenworth Tractor Trailer Truck, 576 So. 2d 261 (Fla. 1990), is an example of this Court's application of the Mailman principal. In that case, the Highway Patrol had seized the subject truck. Id. The Patrol sold the truck to the Department of Transportation. Id. Later, the forfeiture order was reversed. Id. On July 22, 1986 the trial court ordered the truck returned to its owner. Id. The truck was not returned until July, 1988. The trial court refused to award interest or damages. The Court looked at an earlier decision, Wheeler v. Corbin, 546 So. 2d 723 (Fla. 1989) for guidance. In examining the policy reasons to determine whether or not damages and interest should be awarded, the Court stated :

> As then-Chief Justice Ehrlich noted in his special concurrence in Wheeler, "[t]he forfeiture process is analogous to that of arrest, i.e., it is a seizure of property (rather than of the person) for the purpose of controlling crime." Id. at 725 (Ehrlich, C.J., concurring). Carrying the analogy further, Justice Ehrlich stated:
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> > The subsequent acquittal of the defendant does not retroactively invalidate the arrest. Otherwise, "a public officer who instituted criminal proceedings would be liable in damages for malicious prosecution if the person against whom the proceedings were brought were acquitted. Such a state of affairs would be detrimental to the public interest, since public officers would be discouraged from performing their duties conscientiously."
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> Id. (quoting Sponder v. Brickman, 214 So. 2d 631, 632 (Fla. 3d DCA 1968)). Thus, Justice Ehrlich concluded that:
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> > Loss of use of property is the natural and necessary consequence of its seizure by the government. If a governmental agency acts upon probable cause and in good faith in seizing property ... it cannot be held liable for the loss of use of the property any more than it can be held liable for the deprivation of liberty inherent in the detention following arrest of a person alleged to have committed a crime.

Wheeler, 546 So. 2d at 725-26.

In Re Forfeiture, 576 So. 2d, at 262. However, the facts in In Re Forfeiture were not like in Wheeler, nor were they innocent. Despite the existence of a clear legal duty to return the truck in 1986, the State kept the truck until 1988, a period of two years. Therefore, the owner was entitled to damages.

While applied in a different context, this is the same test as in Mailman. Where there is no clear legal duty for the official to act, where there is doubt, then the governmental official is not subject to damages or interest. Wheeler; Mailman. But where that clear legal duty exists, as in a final court order to return a truck after all appeals have been exhausted or after this court rules on the constitutionality of a tax statute and the official refuses to refund the money, then, and only then, may the government be liable for the payment of interest, prejudgment or postjudgment.

CONCLUSION

The State respectfully requests that this Honorable Court affirm the decision of the circuit court in denyng the awarding of postjudgment interest in tax refund cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to: JOSEPHINE A. SCHULTZ, Assistant General Counsel, Office of the Comptroller, Comptroller's Legal Office, the Capitol, Tallahassee, Florida 32399; CHRISTOPHER K. KAY, Esquire, Kay, Panzl & Latham, Post Office Box 3353, Orlando, Florida 32802-3353, and W. GORDON DOBIE, Esquire, Winston & Strawn, 35 West Wacker Drive, Chicago, Illinois 60601, this 1ST day of October, 1996.

ERIC J. TAYLOR