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Chief Deputy Clerk

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

THE DEPARTMENT OF REVENUE
OF THE STATE OF FLORIDA,
et al.,

Petitioners,

Case No. 89,909

vs.

JUDITH A. NEMETH, DONALD J.
NEMETH, AND JOHN L. VITALE, both
individually and on behalf of
all others similarly situated,

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF

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PREFACE

Respondents concur, generally, with Petitioners' statement of the Preface, and especially join in Petitioners' request that this Court announce that Kuhnlein is a narrow exception to Section 215.26, Florida Statutes, except that it be limited to include the particular facts of the case at bar as well.

STATEMENT OF THE CASE

RESTATEMENT OF THE FACTS

Effective July 1st, 1989, Sec. 320.072 FS was enacted imposing a $295.00 impact fee upon the initial application for registration of an automobile. Approximately 100,000 persons paid said tax.

Thereafter, effective July 1st, 1990, Sec. 319.231 FS was enacted. This statute was a modification of Sec. 320.072. Both statutes had the same economic impact. The later statute was found to be unconstitutional in the Kuhnlein case which affected over 600,000 persons.

The Kuhnlein Courts, both at trial and upon Appeal, firmly declared the constitutional invalidity of the second statute and cited many reasons which would pursuade any reviewing Court to come to the same conclusion.

The Complaint in the case at bar includes **a direct attack on the constitutional validity of the tax statute**, on behalf of those persons in the Class who paid the impact fee

under Sec. 320.072, the earlier version of the statute.

The Circuit Court, by order dated April 19th, 1995, dismissed the original Class Action Complaint with leave to file an Amended Complaint.

An Amended Complaint, containing five causes of action was also dismissed by order of the Circuit Court on August 17th, 1995. This latter Order was appealed to the Fourth District Court of Appeals.

The original Complaint and Count I of the Amended Complaint both consisted of a re-statement, verbatim of the Complaint which was sustained in the immediate predecesser of the within case: The Kuhnlein case.

Said Complaint having been sucessfull, all the way up to the Florida Supreme Court, the Respondent saw no need to change it.

Counts II through V of the Amended Complaint were composed directly out of the decisions in the Kuhnlein case, both after trial and appeal to the Florida Supreme Court as follows:

Count II: There is no logical basis to distinguish between out-of-state vehicles and vehicles titled initially in Florida.

Count III: This is a case where the Legislature has enacted a law which is beyond its power to enact.

Count IV: A denial of equal protection.

Count V: No predeprivation hearing is provided under

which a citizen could challenge the assessment before being responsible for its payment.

The original Complaint was filed in the 19th Judicial Circuit Court on October 7th, 1993, with Notice of Claim Letter to State Officials dated December 15th, 1993, attached thereto.

COURSE OF THE PROCEEDINGS BELOW

The Fourth District Court of Appeals reversed the order of the Circuit Court and remanded the action to The Supreme Court with the certification of the following question as one of great public importance:

> WHETHER DEPARTMENT OF REVENUE V. KUHNLEIN, 646 So.2d 717 (Fla. 1994) OVERRULED OR RECEDED FROM STATE EX REL. VICTOR CHEMICAL WORKS V. GAY, 74 So.2d 560 (Fla. 1954) TO THE EXTENT THAT VICTOR CHEMICAL HOLDS THAT THE RIGHT TO A REFUND OF TAXES IS BARRED IF THE TAXPAYER FAILS TO MAKE A TIMELY CLAIM FOR REFUND AS PROVIDED IN SECTION 215.26, FLORIDA STATUTES?

The Fourth District Court of Appeals unanimously agreed that Kuhnlein was controlling precedent in this case.

We respectfully refer this Honorable Court to our main brief below on the issue of court decisions as they relate to when-a-right-to-a-refund-accrues and, accordingly, will not belabor the point anew herein.

Too, we trust that our submissions to the Court below in response its *sua sponte* Order To Show Cause as to whether the "repayment" statute of 1996 renders the case herein moot, will also satisfy this Court on that issue.

STATEMENT OF THE ISSUES

I. Whether the State may use procedural requirements designed to protect legally-collected tax funds, to defeat state and federally-mandated requirements that the state must afford full and fair refunds to persons who were made to pay an illegally-enacted tax?

II. Whether the State may validly assert that Section 215.26(2), requires that application for refund be made within three years of payment when the statute then read three years from accrual of the right to a refund, particularly when said statute later was amended to allow for a five year period for taxpayer relief?

SUMMARY OF THE ARGUMENT

Section 215.26(2) does not set forth a three year requirement for refund application from the date of payment. Despite the numerous times that Petioners assert this gross error, the plain, honest reading of the statute nowhere mentioned the date of payment...until 1995.

The mere fact that the said statute was amended in 1995 to provide a five year window of opportunity for refund application (for payments made after September 30th, 1994) proves, by implication, that the previous version of the statute was defective and did not prevent the interpretation being asserted by Respondents herein.

This Court should view with suspicion the fact that the State Legislature, in 1995, chose September 30th, 1994, as the cutoff date, knowing that this action was pending (although dismissed at Circuit Court). This suit was filed on October 7th, 1994. Is this a remarkable coincidence or

is it an attempt not to provide "meaningful backward looking relief?"

In any event, said amendment, being remedial in nature, should be judicially interpreted as applicable to the case at bar, in which case, suit has been timely brought.

Another salient feature also distinguishing the case at bar from literally any other, is the passage by the Florida Legislature, during the 1996 Session of Chapter 96-243, Laws of Florida, which provided for payment to that class of tax payers embraced in this suit...without regard to compliance with any alleged conditions precedent, and also ignoring any alleged requirement to first file with the State Comptroller for a refund before bringing suit.

Said statute constitutes a valid waiver by the State of Florida of any alleged conditions precedent by imposing no impediments to an application for refund of the base sum illegally taxed, but making no provision for payment of interest nor providing for payment of attorney's fees.

Under Kuhnlein 600,000 person were judically found to be entitled to refund. In the case at bar, almost 100,00 person were affected by being made to pay an identical tax under virtually the same conditions...with the tax being subject to the same deficiencies as have been found by this Court to justify setting the improper Kuhnlein impost aside.

The same relief should be granted to the proposed class herein.

ARGUMENT

I. PETITIONERS' BRIEF IS SERIOUSLY DEFECTIVE FOR

A. FAILING TO DISTINGUISH KUHNLEIN (WHICH WE CONTEND CONTROLS NEMETH) AND THE CASE AT BAR FROM ANY OF THE OTHER CASES CITED BY PETITIONERS

The State raises its arguments as if this Court had never decided the Kuhnlein case. The State continues to raise issues fully disposed of in Kuhnlein, which issues have already been judicially resolved adverse to the position being asserted by the State herein.

The Petitioners have failed to show any reasoning nor have they elicited any cases to prove that Kuhnlein is not applicable herein.

Indeed, petitioners are appalled that so many Florida Courts are embracing the reasoning in Kuhnlein as being a step in the direction of remedial justice.

Having failed to prove otherwise, petitioners should be bound by Kuhnlein as controlling precedent herein.

B. FOR ITS FAILURE TO EXPLAIN AWAY A CLEAR READING OF SECTION 215.26, FLORIDA STATUTES, REGARDING "ACCRUAL" OF THE RIGHT TO REFUND, especially in view of

1. THE RECENT AMENDMENT IN 1995 TO SECTION 215.26, FLORIDA STATUTES, EXPANDING THE TIME FOR REFUND APPLICATION TO FIVE YEARS FROM PAYMENT, and

2. THE RECENT "REPAYMENT" STATUTE (CHAPTER 96-243, LAWS OF FLORIDA) AUTHORISING PAYMENT TO (THEORETICALLY) ALL PERSONS IN THE CLASS HEREIN, WITHOUT REGARD TO COMPLIANCE WITH ANY ALLEGED CONDITIONS PRECEDENT, CONSTITUTING A LEGISLATIVE WAIVER OF ALL CONDITIONS PRECEDENT HEREIN, creating legal conditions for possible summary judgment against the State and

3. THE FACT THAT NONE OF THE FEDERAL AND SISTER STATE CASES CITED BY PETITIONERS HAS BEEN SHOWN TO INVOLVE A REFUND STATUTE WITH IDENTICAL WORDING ALLOWING A PERIOD FOR REFUND APPLICATION "...WITHIN THREE YEARS AFTER THE RIGHT TO SUCH REFUND SHALL HAVE ACCRUED..."

Literally all of the cases cited by Petitioners include precise and specific language setting forth the time requirements and specifying a particular event *i.e.* date of payment or filing of a return, etc. No such language was included in Florida's Refund Statute until 1995 and therefore none of the cases and statutes proffered by the State are applicable herein.

Point II A. THE STATE OF FLORIDA NOW SEEKS TO CIRCUMVENT THE REASONING OF THIS COURT'S KUHNLEIN DECISION TO ONCE AGAIN DEPRIVE CERTAIN CITIZENS OF THE UNITED STATES AND THE STATE OF FLORIDA OF THEIR CONSTITUTIONALLY PROTECTED RIGHT AGAINST DISCRIMINATION BY THE USE OF A PROCEDURAL REFUND STATUTE BECAUSE, WHEN THE UNDERLYING TAX STATUTE IS UNCONSTITUTIONAL, THEN ANY IMPOSITION OF AN UNFAIR IMPEDIMENT TO A FULL REFUND MUST ALSO BE UNCONSTITUTIONAL.

Indeed, in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S.18, (1990) the United Stated Supreme Court held in that Florida case:

> "2. If a State penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review of the tax's validity later in a refund action, the Due Process Clause of the Fourteenth Amendment requires the State to afford them meaningful postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional."

The McKesson court went on to cite with approval the opinion of Mr. Justice Holmes in Atchison, T. & S.F.R. Co. v O'Connor, 223 US 280 (1911) (not cited by Petitioners):

"Thus, in a post deprivation refund action, the State must provide...'a clear and certain remedy,' for any erroneous or unlawful tax collection."

B. NEITHER MAY THE STATE RELY UPON THE DOCTRINE OF SOVEREIGN IMMUNITY TO RETAIN THE FRUITS OF ITS ILLEGAL TAXATION, ESPECIALLY IN THE FACE OF FEDERAL CONSTITUTIONAL REQUIREMENTS THAT FLORIDA IS TO PROVIDE MEANINGFUL BACKWARD LOOKING RELIEF.

In McKesson, supra, the United State Supreme Court held:

"(c) Neither of the 'equitable considerations' cited by the State is sufficient to override the constitutional requirement of retrospective relief."

and

"The State cannot persuasively claim that 'equity' entitles it to retain tax moneys taken unlawfully..."

To the same effect is the United States Supreme Court determination in Davis v. Michigan Department of Treasury, 489 U.S. 803, (1989):

"...to the extent appellant has paid taxes pursuant to this invalid tax scheme, he is entitled to a refund."

The United States Supreme Court in Harper, infra, specifically held:

"But we have since adopted a rule requiring the retroactive application of a civil decision such as *Davis*."

The United States Supreme Court, in Fulton Corporation v Janice Faulkner, Secretary of Revenue of North Carolina, 64 USLW 4088 (1996) held:

"(a) State laws discriminating against interstate commerce on their face are 'virtually *per se* invalid."

Said Court cited Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore., 511 U.S. ___, ___, and Philadelphia v. New Jersey, 437 U.S. 617 (1978).

Fulton had also sought a refund under the terms of the appropriate state statute and attorney's fees. The state trial court ruled in favor of the Secretary. The United States Supreme Court unanimously reversed and remanded.

We now call the Court's attention to the United States Supreme Court's determination in Harper v. Virginia Department of Taxation, 113 S.C.R. 2510 (1993) (also not cited by Petitioners) which held in pertinent part:

> "[B]oth the common law and our own decisions' have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Robinson v. Neil*, 409 U.S. 505 (1973). Nothing in the Constitution alters the fundamental rule of "retrospective operation" that has governed "[j]udicial decisions ... for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910).
>
> (Punctuation as in original)

and

> "The Supremacy Clause, U.S. Const., Art. VI, cl. 2, does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law. Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law, ... cannot extend to their interpretations of federal law."

CONCLUSION

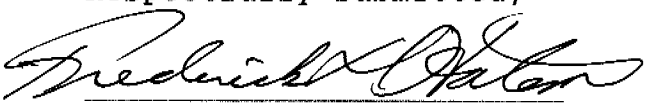
Knowing that it can retain any unpaid restitution, the State of Florida continues to be embarked on a program, deliberately and\or negligently, of obstructing any attempt to secure repayment of the stolen fruits gotten by the illegal acts of the Florida Legislature, without penalty.

The contumacious conduct of State agents, as evidenced before this Court in the Kuhnlein case and which are continued until this time, resulted in this Court taking close supervision of the refund process.

No less should be done herein.

In the interests of judicial economy, it is respectfully prayed that this Court affirm the decision of the Fourth District Court of Appeal and certify that this class action is a valid proceeding and undertake close supervision of the refund process and order payment of Respondents' attorneys fees and also order that pre- and post judgement interest be paid to those taxpayers who, for almost seven years are unlawfully deprived of their funds.

Respectfully submitted,



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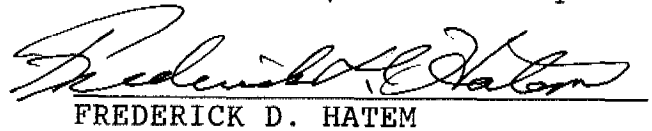
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been forwarded by U.S. Mail to the Office of the Attorney General, ERIC J. TAYLOR, Assistant Attorney General, The Capitol, PL01, Tallahassee, Florida 32399-1050, and to JOSEPHINE A. SCHULTZ, Assistant General Counsel, Office of the Comptroller, The Capitol - 13th Floor, Tallahassee, Florida 32399-0350,this 8th day of April, 1997.



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