IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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

Petitioners,

vs.

Case No. 89,909

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

Respondents.
_____/

PETITIONERS' APPENDIX TO ITS INITIAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 0337609

OFFICE OF THE ATTORNEY GENERAL
The Capitol - PL01
Tallahassee, Florida 32399-1050
(904) 487-2142
(904) 488-5865 (FAX)

Counsel for Petitioners

ROBERT F. MILLIGAN
COMPTROLLER

JOSEPHINE A. SCHULTZ
ASSISTANT GENERAL COUNSEL
Fla. Bar No. 0722650

OFFICE OF THE COMPTROLLER
The Capitol - 13th Floor
Tallahassee, Florida 32399-0350
(904) 488-9896
(904) 922-6386 (FAX)

Counsel for the Comptroller

INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR ST. LUCIE COUNTY, FLORIDA.

JUDITH A. NEMETH et al.

Plaintiff(s),

vs.

FLORIDA DEPARTMENT OF REVENUE; et al.

Defendant(s)

CASE NO. 94-1144CA17

ORDER OF DISMISSAL AND FINAL JUDGMENT

This Matter was heard on a Defendants' Motion To Dismiss. I have considered the Motion, record, arguments of counsel and am otherwise advised in the premises.

In my view Sex. 215.26(2) Fla. Stat. must be considered in light of State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954). Of course that court dealt with a prior version of Section 215.26 and the facts involved the failure to file an application for a refund. In Department of Revenue v Kuhnlein, 646 So. 2d 717 (Fla. 1994), Florida's Supreme Court discounted the necessity to file a formal refund application.

Nonetheless, Kuhnlein did not overrule Victor Chemical's decision that 215.26(2) was a non-claim statute. There is a substantial difference between a non-claim statute and a statute of limitations.

Even though I may feel it is unfair to treat the Plaintiffs and proposed class plaintiffs in this case differently from those who were afforded relief in Kuhnlein, I have a duty to follow the law as construed by appellate courts. Notwithstanding the equities, I conclude that Victor Chemical controls.

Plaintiffs acknowledge they can not otherwise satisfy my concerns and offered to have this case immediately certified for appeal. A Circuit Judge can not certify a case for appellate consideration. However, I can make a final determination which will enable an appeal.

Based upon the foregoing, it is thereupon,

ORDERED AND ADJUDGED as follows:

1. Defendants' Motion is granted and this case is dismissed with prejudice.

2. Plaintiffs shall have and take nothing from Defendants, who shall go hence without day.

3. Jurisdiction is reserved to consider court costs as necessary and proper.

DONE AND ORDERED at Fort Pierce, St. Lucie County, Florida, this 15th day of August 1995.

SCOTT M. KENNEY, CIRCUIT JUDGE

Copies To:
Frederick D. Hatem, Esq.
Eric J. Taylor, Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a conformed copy of the foregoing has been furnished to the above-stated attorneys or pro se parties via first class, postage prepaid mail at the most recent address listed in the Court File or to the Courthouse box for local attorneys, this 16 day of Aug, 1995.

Judicial Assistant

Taxation--Challenge to constitutionality of vehicle impact fee--Dismissal of action for failure to allege that plaintiffs had filed claim for refund is reversed--Statute requiring that claim for refund be filed with the Comptroller before challenging constitutionality of tax does not apply to persons challenging the impact fee--Question certified: Whether *Department of Revenue v. Kuhnlein* overruled or receded from *State ex rel. Victor Chemical Works v. Gay* 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

JUDITH A. NEMETH, DONALD J. NEMETH and JOHN L. VITALE, both individually and on behalf of all others similarly situated, Appellants, v. FLORIDA DEPARTMENT OF REVENUE, et al., Appellees. 4th District. Case No. 95-3096. Opinion filed January 22, 1997. Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Scott M. Kenney, Judge; L.T. Case No. 94-1144 CA 17. Counsel: Frederick D. Hatem, Port St. Lucie, for appellants. Robert A. Butterworth, Attorney General, and Eric J. Taylor, Assistant Attorney General, Tallahassee, for appellees.

(DELL, J.) Appellants, individually and on behalf of a class of others similarly situated, appeal from an order of dismissal with prejudice and final judgment entered on their amended complaint. Appellants challenge the constitutionality of the Florida Vehicle Impact Fee, section 320.072(1)(b), Florida Statutes (Supp. 1990), and seek a refund of the taxes paid under the statute. Appellants contend that the trial court erred in dismissing their complaint with prejudice because they failed to allege that they had filed a claim for refund as required by section 215.26(2), Florida Statutes (Supp. 1994).1 Appellants argue that *Department of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994) controls this case, and that *State ex rel. Victor Chemical Works v. Gay*, 74 So. 2d 560 (Fla. 1954) does not apply to their claims. We agree and reverse and remand this cause for further proceedings.

The trial court stated in its order of dismissal:

In my view Sec. 215.26(2) Fla. Stat. (sic) must be considered in light of State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954). Of course that court dealt with a prior version of Section 215.26 and the facts involved the failure to file an application for a refund. In Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), Florida's Supreme Court discounted the necessity to file a formal refund application.

Nonetheless, Kuhnlein did not overrule Victor Chemical's decision that 215.26(2) was a non-claim statute. There is a substantial difference between a non-claim statute and a statute of limitations.

Even though I may feel it is unfair to treat the Plaintiffs and proposed class plaintiffs in this case differently from those who were afforded relief in Kuhnlein, I have a duty to follow the law as construed by appellate courts. Notwithstanding the equities, I conclude that Victor Chemical controls.

In *Victor Chemical*, the supreme court explained:

F.S. Section 215.26, F.S.A., is not, strictly speaking, a statute of limitations but is more in the nature of a statute of non-claim. The application for refund is required to be made within one year after the right to such refund shall have accrued and if no application has been made, the right to any refund shall be barred.

. . . .

In short it is the universal rule that a statute of non-claim runs from the time the taxes are paid and is not postponed until the legality of the tax has been judicially determined. 84 C.J.S., Taxation, § 639(c).

Id. at 562. The supreme court also rejected the argument that the taxpayers could not claim a refund because they did not know of the right to do so until the legality of the tax had been determined:

It is strongly urged by the relator that he could not file claim for refund because he did not know that his right to do so had accrued until there was a final determination of the legality of the tax by this Court. This contention is without merit.

. . . .

The tax payer had the right to pay the tax and then seek refund after it was paid and bring a mandamus action to have the validity of the statute tested and to direct a refund of the taxes paid. The taxpayer was not required to wait until some stranger to him brought a proceeding to test the validity of the statute. It could have brought a single proceeding to determine the validity of the tax and for a refund. It knew that the tax had been imposed. It knew that it had paid the tax. It knew that it had the right to file an application for refund and if brought in time, a mandamus proceeding is one of the correct proceedings to determine the validity of the tax. It failed to file any claim or take any action within one year of the time of the payment2 which is the time of the accrual of the right in this case and the claim involved is now barred by F.S. Section 215.26, F.S.A.

Id. at 564-65. We would affirm the trial court's order but for the supreme court's holding in *Kuhnlein*.

In *Kuhnlein*, the supreme court addressed a claim for refund of impact fees under a statute nearly identical to that considered sub judice. The supreme court held that persons who paid the impact fee pursuant to section 319.231, Florida Statutes (1991)3 had standing to challenge the constitutionality of the statute and seek a refund for the taxes paid. It appears that the state argued in *Kuhnlein*, as it does here, that persons who sought a refund of fees lacked standing because they failed to comply with section 215.26, Florida Statutes (1993) by first filing a claim for refund with the Comptroller. The supreme court dispensed with the state's argument by stating:

Initially, the State argues that various plaintiffs below lacked standing to pursue this case because they either have not paid the fee or have not requested a refund of any fee paid. We note that the trial court rejected the State's factual contentions with respect to some appellants, and the record adequately supports the judge's findings. We also do not believe there is any requirement that the plaintiff must pay the fee or request a refund, at least in the present case. The fact that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax is sufficient to create standing under Florida law.

Id. at 720.

Accordingly, we hold that this case must be reversed on the authority of *Kuhnlein*. However, we consider the applicability of section 215.26, Florida Statutes, to claims for refund of taxes paid to be a question of great public importance. We therefore certify the following question:

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?

Accordingly, we reverse and remand this cause for further proceedings.

REVERSED and REMANDED; QUESTION CERTIFIED. (KLEIN and STEVENSON, JJ., concur.)

1Section 215.26(4), Florida Statutes (Supp. 1994), provides ``the exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury.''

2Section 215.26 has been amended to provide a three-year time limitation for filing of claims for refund.

3Section 319.231, Florida Statutes (1991) repealed and superseded section 320.072(1)(b). Section 319.231 imposed a $295.00 impact fee upon initial titling of a motor vehicle as opposed to its predecessor, section 320.072(1)(b) which imposed the $295.00 impact fee upon registration.

* * *

Civil procedure--Class actions--Standing--Action challenging constitutionality of an assessment to fund Public Medical Assistance Trust Fund brought by individual physician and professional service corporations who believed they were improperly classified as ``health care entities'' subject to assessment--General rule requiring plaintiffs to seek and be denied a refund to establish standing to sue for a tax refund does not apply to plaintiffs' challenge of allegedly unconstitutional assessment--Refund claim based on constitutional concerns can be brought as class action provided rules of procedure and statutory requirements relating to the maintenance of class actions are met

PUBLIC MEDICAL ASSISTANCE TRUST FUND; et al., Appellants, v. NATHAN M. HAMEROFF, M.D.; et al., Appellees. 1st District. Case No. 96-2172. Opinion filed February 18, 1997. An appeal from the Circuit Court for Leon County. William Gary, Judge. Counsel: Robert A. Butterworth, Attorney General; Eric J. Taylor, Assistant Attorney General; James A. Peters, Assistant Attorney General, Tallahassee, for Appellants. Murray B. Silverstein of Powell, Carney, Hayes & Silverstein, P.A., St. Petersburg; Cynthia A. Mikos of Jacobs, Forlizzo & Neal, P.A., Clearwater, for Appellees.

(VAN NORTWICK, J.) Appellants challenge a non-final order which certified a class for the purpose of a constitutional challenge of the ``assessment'' established in section 395.7015(2)(b), Florida Statutes (1993), to fund (Florida's) Public Medical Assistance Trust Fund (PMATF), section 395.701, Florida Statutes (1993), *et seq*. We have jurisdiction, rule 9.130(a)(3)(C)(vii), Florida Rules of Appellate Procedure, and we affirm on the authority of *Dept. of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994).

Section 395.7015(2)(b) provides for the assessment of 1.5 percent of the annual net operating revenue of hospitals and other ``health care entities'' operating in the state for the purpose of funding the PMATF. Plaintiffs/appellees, an individual physician and several professional service corporations each comprising a group practice of physicians, filed a complaint for equitable relief and damages individually, and on behalf of the class of others similarly situated, asserting that the PMATF assessment was unconstitutional. Appellants opposed certification essentially on the ground that the plaintiffs were not sufficiently similarly situated to the proposed class and that they had failed to first comply with section 215.26, Florida Statutes, by paying the assessment and then applying for a refund thereof. After hearing argument on the matter, the lower court granted class certification upon a finding that all plaintiffs believed they were improperly designated as ``[d]iagnostic-imaging centers'' under section 395.7015(2)(b)4., Florida Statutes (1993), which resulted in plaintiffs being classified as ``health care entities'' and, thus, being made subject to the PMATF assessment.

On appeal, the appellants argue that those plaintiffs/appellees who have not sought and been denied a refund of the PMATF assessment have no standing to serve as class representatives because compliance with the refund procedure in section 215.26, Florida Statutes (1993), is necessary before a civil action for refund may be filed. Appellees argue in response, and we agree, that under *Dept. of Revenue v. Kuhnlein*, 646 So. 2d 717 (Fla. 1994), compliance with the refund procedure is not required as a condition of bringing the instant action.

In *Kuhnlein* certain Florida residents challenged the constitutionality of an impact fee imposed on cars purchased out-of-state but later registered in Florida. In *Kuhnlein*, as here, the state contended that the class action was barred because none of the class representatives had applied for a refund pursuant to sections 215.26 and 26.012(2)(e). *Kuhnlein*, 646 So. 2d at 721. The supreme court expressly rejected this argument:

We . . . do not believe there is any requirement that the plaintiff must pay the fee or request a refund, at least in the present case. The fact that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax is sufficient to create standing under Florida law.

* * *

The State . . . argues that the cause below was barred by the state's sovereign immunity, by an alleged common law rule that no one is entitled to the refund of an illegal tax, and by the requirements of Florida refund statutes. Even if true, these are not proper reasons to bar a claim based on constitutional concerns. Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. Moreover, neither the common law nor a state statute can supercede a provision of the federal or state constitutions.

We are also unpersuaded by the State's claim that a refund claim cannot be cast as a class action. Any constitutional claim affecting a class of persons can be the proper subject of a class action, provided other procedural requirements are met, as they were here.

Id. at 720, 721 (emphasis in original).

We read *Kuhnlein* as creating an exception to the general rule established by *Devlin v. Dickinson*, 305 So. 2d 848 (Fla. 1st DCA 1975), and similar cases, which requires a party to first seek and be denied a refund before filing suit for a tax refund. Appellants urge us to read that portion of *Kuhnlein*, quoted above, which refers to ``other procedural requirements,'' as necessitating an application for and denial of a refund. Such a reading, however, would fly in the face of the clear holding in *Kuhnlein* that fulfilling the state's refund procedures is not a condition precedent to bringing a constitutionally-based refund action. It is obvious to us that, read in context, this quoted language refers to the rules of procedure and statutory requirements relating to the maintenance of class actions.

Accordingly, the order under review is AFFIRMED. (BOOTH AND PADOVANO, JJ., CONCUR.)

* * *

1

Jose Marcelino REGALADO, Appellant,

v.

BROAD AND CASSEL, etc., et al., Appellees.

No. 95-1955.

District Court of Appeal of Florida, Third District.

Oct. 2, 1996.

Rehearing Denied Nov. 20, 1996.

An appeal from the Circuit Court for Dade County, Herbert Klein, Judge.

Arnold Ginsberg, Lionel Barnet, Miami, for appellant.

Rumberger, Kirk & Caldwell and Joshua D. Lerner, Miami, for appellees.

Before BARKDULL, NESBITT and GERSTEN, JJ.

PER CURIAM.

Affirmed. *Johnson v. Allen, Knudsen, DeBoest, Edwards & Rhodes, P.A.*, 621 So.2d 507 (Fla. 2d DCA 1993); *Cherney v. Moody*, 413 So.2d 866 (Fla. 1st DCA 1982).

2

George WESTRING, Appellant,

v.

The STATE of Florida,

Department of Revenue, Appellee.

No. 95-1879.

District Court of Appeal of Florida, Third District.

Oct. 2, 1996.

Taxpayer brought action challenging validity of documentary stamp tax assessed on quitclaim deed, executed under marital settlement agreement, which transferred marital home from entireties back to taxpayer individually. The Circuit Court, Dade County, Juan Ramirez, Jr., J., denied relief, and taxpayer appealed. On rehearing, the District Court of Appeal held that taxpayer was required to file claim for refund before he could invoke jurisdiction of circuit court.

Affirmed.

Jorgenson, J., filed opinion dissenting from denial of rehearing en banc.

Taxation ⇐543(2)

Taxpayer was required to file claim for refund before he could invoke jurisdiction of circuit court regarding validity of documentary stamp tax imposed upon quitclaim deed executed pursuant to marital settlement agreement, conveying title to marital home from entireties back to taxpayer individually. West's F.S.A. §§ 201.02(1), 215.26.

Frank A. Abrams, Miami, for appellant.

Robert A. Butterworth, Attorney General, and Jeffrey M. Dickman, Elizabeth, T. Bradshaw and Jarrell Murchison, Assistant Attorneys General, for appellee.

Before SCHWARTZ, C.J., and NESBITT and JORGENSON, JJ.

PER CURIAM.

On Rehearing Granted

The appellee's motion for rehearing is granted.

In 1994, as provided by their marital settlement agreement, the appellant Westring and his then-wife executed a quitclaim deed conveying title to their home, which he had owned before the marriage, from the entireties back to Westring individually. Notwithstanding that no money changed hands, and even though the parties' liability on the outstanding mortgage was not affected, Westring paid a documentary stamp tax, as purportedly required by section 201.02(1), Florida Statutes (1993), based upon the "consideration" represented by the amount

of that mortgage.[1] In this proceeding, Westring, suing individually and as the representative of a purported class of similar taxpayers, sought declaratory and injunctive relief and a refund, contending that the tax was invalidly imposed. The Department of Revenue moved to dismiss on the grounds that no claim for a refund had been filed, and that the complaint failed to state a cause of action because the tax was, as a matter of law, properly exacted. The trial court dismissed the action solely on the first ground, and Westring appeals. We affirm.

Under the authority of *State ex rel. Victor Chemical Works v. Gay*, 74 So.2d 560 (Fla. 1954), Westring is required to file a claim for a refund pursuant to section 215.26, Florida Statutes (1993), before he may invoke the jurisdiction of the circuit court. In *Victor Chemical Works*, the supreme court, in dealing with the statute at issue here, quoted with approval a discussion from one of its previous cases regarding statutes of non-claim arising in the probate context: "where no exemption from the provisions of a statute exist, the court is powerless to create one." *Id.* at 563 (internal citations omitted). The court recognized that the nature of non-claim statutes is to preclude a right of action unless and until the claim is filed and, of course, filed within the time permitted by statute.

As the Department of Revenue correctly notes, Westring is still within the three-year statutory non-claim period provided by section 215.26, Florida Statutes (1993). Accordingly, the lower court's order dismissing Westring's complaint is affirmed without prejudice to Westring to apply for a refund in accord with the applicable statutory provisions.

SCHWARTZ, C.J., and NESBITT, J., concur.

JORGENSON, Judge, dissenting from the denial of rehearing en banc.

On motion of the taxpayer, the court conferenced this case but denied the taxpayer's motion for rehearing en banc. Based upon the reasoning set forth in my dissent to the panel opinion, I must now further dissent.

This case is ripe for review and presents a clear and significant issue of constitutional importance. To foreclose further review is contrary to public policy and to the administration of justice.

At the very least, this court, as the taxpayer has requested, should certify to the Florida Supreme Court this question of great public importance:

MUST A PLAINTIFF CHALLENGING THE CONSTITUTIONALITY OF A SPECIFIC TAX FIRST REQUEST A REFUND BEFORE A COURT OF COMPETENT JURISDICTION CAN ENTERTAIN A CHALLENGE TO THAT TAX, WHEN THE DEPARTMENT OF REVENUE HAS UNEQUIVOCALLY STATED THAT THE APPLICATION FOR REFUND WOULD BE DENIED?

1. § 201.02 Tax on deeds and other instruments relating to real property or interest in real property.—

(1) On deeds, instruments, or writings whereby any lands, tenements, or other real property, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or any other person by his direction, on each $100 of the consideration therefor the tax shall be 70 cents. When the full amount of the consideration for the execution, assignment, transfer, or conveyance is not shown in the face of such deed, instrument, document, or writing, the tax shall be at the rate of 70 cents for each $100 or fractional part thereof of the consideration therefor. *For purposes of this section, consideration includes,* but is not limited to, the money paid or agreed to be paid; the discharge of an obligation; and *the amount of any mortgage, purchase money mortgage lien, or other encumbrance, whether or not the underlying indebtedness is assumed.* If the consideration paid or given in exchange for real property or any interest therein includes property other than money, it is presumed that the consideration is equal to the fair market value of the real property or interest therein.

§ 201.02(1), Fla.Stat. (1993)(emphasis supplied).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to: **FREDERICK D. HATEM,** Esquire, 1549 SE Westmoreland Boulevard, Port St. Lucie, Florida 34952, this 21st day of March, 1997.

ERIC J. TAYLOR