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' INITIAL BRIEF

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## PREFACE

The issue before this Court today is the continuing validity of the legislative requirements of Section 215.26, Florida Statutes, which requires both the individual filing of a refund claim and the timely filing of such a refund claim. The validity of this Court's decisions upholding strict compliance with the provisions of Section 215.26, Florida Statutes, have come into question in light of this Court's language in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). Compare, Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295 (Fla. 1967); State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954); State, ex rel. Tampa Electric Company v. Gay, 40 So. 2d 225 (Fla. 1949); and, State ex rel. Hardaway Contracting Co., Inc. v. Lee, 155 Fla. 724, 21 So. 2d 211 (1945); with, Kuhnlein, supra.

The District Courts and the circuit courts, that have interpreted Kuhnlein, now believe that taxpayers, claiming a constitutional challenge to a tax or fee, are entitled to file suit in circuit court without complying with any of the provisions of Section 215.26, Florida Statutes. This has lead to decisions in those court permitting no filings of refund applications with the Comptroller, allowing mass claims to be heard when the individual has not filed a claim, and permitting refund claims to be heard, and possibly paid, when the statute of nonclaim has expired for many of the taxpayers.

This Court should readdress Section 215.26, Florida Statutes, all of its past decisions interpreting Section 215.26, Florida Statutes, especially, Victor Chemical, and the Court's recent decision of Kuhnlein. Petitioners request that this Court reaffirm its decisions of Reynolds Fasteners, Inc. v. Wright, Victor Chemical, Tampa Electric Company v. Gay, and Hardaway Contracting Co. v. Lee, and announce that Kuhnlein is a narrow exception to Section 215.26, Florida Statutes, and is to be strictly limited to the particular facts of that case.

## STATEMENT OF THE CASE

## STATEMENT OF FACTS

During the 1990 legislative session, the Florida Legislature enacted legislation that imposed a $295.00 impact fee "upon the initial application for registration pursuant to s. 320.06 of every motor vehicle classified in s. 320.08(2), (3), and (9)(c) and (d)." Section 74, Chapter 90-132, Laws of Florida, and was codified as Section 320.072(1)(b), Florida Statutes (1990 Supp.). Section 320.072(1)(b) took effect on July 1, 1990. Section 74, Chapter 90-132, Laws of Florida. The law remained in effect until June 30, 1991, when Section 320.072(1)(b), Florida Statutes, was repealed and superseded by Section 319.231, Florida Statutes (1991).[1]/ As the very words imply, between July 1, 1990 and June 30, 1991, an impact fee of $295.00 was imposed upon the person registering the vehicle.[2]/

Ms. Judith Nemeth is a resident of Florida. (R:2;76)[3]/ Ms. Nemeth purchased a 1989 Plymouth Grand Voyager in New Jersey. (R:2;76) Ms. Nemeth moved to Florida in 1990. (R:2;76) On November 24, 1990, Ms. Nemeth registered her Voyager in Port St. Lucie, St. Lucie County, Florida. (R:2;76) At the time of registration, Ms. Nemeth was required to pay $295 for the impact fee imposed by Section 320.072(1)(b), Florida Statutes, (1990 Supp.). (R:2;76) Ms. Nemeth paid the $295 impact fee in November, 1990. (R:2;76) Ms. Nemeth is now seeking a refund of the impact fee she paid on

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[1]/ Section 319.231, Florida Statutes, was struck in 1994 by the Florida Supreme Court as being in violation of the Commerce Clause. Department of Revenue v. Kuhnlein, 647 So. 2d (Fla. 1994). Section 320.072(1)(b), Florida Statutes (1990 Supp.) was the predecessor to Section 319.231, Florida Statutes.

[2]/ Section 319.231, Florida Statutes (1991), imposed a $295.00 impact fee upon the initial "titling" of a motor vehicle as opposed to Section 320.072(1)(b)'s imposition on "registration."

[3]/ Taken as true from the Respondents' Complaint and Amended Complaint.

November 24, 1990. Ms. Nemeth did not allege in the Complaint that she has ever filed a refund request for the $295 with the Defendant Department of Highway Safety and Motor Vehicles (DHSMV) or that she was denied a refund request, as required by Section 215.26, Florida Statutes.

Mr. Donald Nemeth is a resident of Florida. (R:3;77) Mr. Nemeth purchased a 1985 Dodge Daytona in New Jersey. (R:3;77) Mr. Nemeth moved to Florida in 1990. (R:3;77) On November 24, 1990, Mr. Nemeth registered his Dodge in Port St. Lucie, St. Lucie County, Florida. (R:3;77) At the time of registration, Mr. Nemeth was required to pay $295 for the impact fee imposed by Section 320.072(1)(b), Florida Statutes (1990 Supp.). (R:3;77) Mr. Nemeth paid the $295 impact fee in November, 1990. (R:3;77) Mr. Nemeth is now seeking a refund of the impact fee he paid on November 24, 1990. Mr. Nemeth did not allege that he has ever filed a refund request for the $295 with the DHSMV or that he was denied a refund request, as required by Section 215.26, Florida Statutes.

During 1990, Mr. John L. Vitale moved from New York to Florida. (R:3;77) Mr. Vitale registered his 1989 Nissan on January 7, 1991 in Port St. Lucie, St. Lucie County, Florida. (R:3;77) Mr. Vitale was required to pay all regularly required fees to title and register a vehicle imposed by Chapters 319 and 320, Florida Statutes, including the $295 "impact fee" imposed by Section 320.072(1)(b), Florida Statutes (1990 Supp.). (R:3;77) Mr. Vitale paid the impact fee on January 7, 1991. (R:3;77) Mr. Vitale is now seeking a refund of the impact fees paid during the registration of his 1989 Nissan. Mr. Vitale did not allege that he has ever filed a refund request for the $295 with the DHSMV or that he was denied a refund request, as required by Section 215.26, Florida Statutes.

## COURSE OF THE PROCEEDINGS BELOW

This action was initially filed in the Circuit Court for the 19th Judicial Circuit, in and for St. Lucie County, Florida, on October 4, 1994. (R:1-16) Respondents challenged the constitutionality of Section 320.072(1)(b), Florida Statutes (1990 Supp.). Primarily, the Respondents alleged that Section 320.072(1)(b), Florida Statutes (1990 Supp.), was in violation of the Commerce Clause, as it both discriminated against and was a burden on interstate commerce (R:11-12), and infringed upon the right to travel (R:12-13).

Petitioners responded to the Respondents' complaint by filing a motion to dismiss (R:17-18), accompanied by a supporting memorandum (R:19-29). Petitioners' motion was two-fold. First, the Petitioners asserted that the Respondents had not filed a refund request as required by Section 215.26, Florida Statutes, and, thus, the Circuit Court had no jurisdiction under Section 26.012(2)(e), Florida Statutes, to hear the action. Secondly, the Petitioners asserted that the Respondents did not file a refund application with the Comptroller within the three (3) year time period from paying the fee or tax and were thus barred from seeking any refund by Section 215.26(2), Florida Statutes.

A hearing was held on the Petitioners' motion on April 12, 1995. The Circuit Court issued an Order on April 19, 1995, granting Petitioners' motion and dismissing the action but allowed Respondents the opportunity to file an amended complaint within ten (10) days of the Order. (R:74). Respondents filed an amended complaint within the ten days. (R:75-92). The Respondents asserted in their amended complaint that, in addition to the same challenge raised in the first complaint (R:85-87), Section 215.26, Florida Statutes, was unconstitutional, was beyond the power of the Legislature to pass, denied Respondents access to the courts and denied the Respondents equal

protection (R:87-88). In the Amended Complaint, Respondents alleged that they had no "predeprivational hearing" opportunity to challenge Section 320.072(1)(b), Florida Statutes, before paying the impact fee (R:88). Respondents did **not** allege any additional or different facts from the first complaint.

Petitioners again filed a motion to dismiss the amended complaint (R:93-94), along with a supporting memorandum (R:95-109). Petitioners asserted that the first 12 pages of the amended complaint were an exact copy of the dismissed complaint (R:95). The remaining allegations were not directed to the Respondents' defect in timing but presented an attack on the constitutionality of Section 215.26, Florida Statutes (R:100-103); the power of the Legislature to enact Section 215.26 (R:103-104); and arguing that Section 215.26 denied due process and equal protection (R:104-106), and denied access to the courts (R 106-107).

The Circuit Court held a hearing on the Petitioners' motion to dismiss the Respondents' amended complaint on August 11, 1995. Having not alleged that any action was taken by any of the Respondents within three (3) years of paying the impact fee, the Circuit Court ruled that the Respondents were timed barred from seeking a refund. (Appendix A) (R: 142-143).[4]/ Respondents timely filed their notice of appeal on September 5, 1995. (R: 146-150).

On January 22, 1997, the Fourth District Court of Appeal reversed the decision of the circuit court. Nemeth v. Department of Revenue, 22 Fla. Law Weekly D249a (Fla. 4th DCA January 22, 1997)(Appendix B). The District Court ruled that this Court's decision in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), has

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[4]/ Since the Circuit Court limited its ruling to the time limitations contained in Section 215.26(2), Florida Statutes, the Circuit Court did not make any ruling on Respondents' challenge to the constitutionality of Section 215.26 and their allegations of due process, access to courts or predeprivational hearings.

overruled this Court's decision in State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954).[5]/ In so holding, the District Court negates any requirement to file a refund claim under Section 215.26, Florida Statutes, or to file such a claim with 3 years of the date of payment as required by Section 215.26(2), Florida Statutes.[6]/ The District Court did certify the following question to this Court to be 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?

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[5]/ Implicitly, the District Court believes that Kuhnlein also overrules all of this Court's prior decisions concerning Section 215.26, Florida Statutes, such as, Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295 (Fla. 1967), State, ex rel. Tampa Electric Company v. Gay, 40 So. 2d 225 (Fla. 1949), State, ex rel. Hardaway Contracting Co. v. Lee, 155 Fla. 724, 21 So. 2d 211 (1945), and many decisions of other district courts of appeal.

[6]/ On February 18, 1997, the First District Court of Appeals issued its ruling in Public Medical Assistance Trust Fund, et al., v. Hameroff, 22 Fla. Law Weekly D497d (Fla. 1st DCA February 18, 1997) (Appendix C). Like Nemeth and the recent decision of the Third District Court of Appeal in Westring v. State, Department of Revenue, 682 So. 2d 171 (Fla. 3d DCA 1996) (Appendix D), no taxpayer had filed a refund claim before the initiation of the lawsuit. Like Nemeth, one of the plaintiffs paid the assessment more than three years before the initiation of the suit. The First District interpreted Kuhnlein as "creating [a general] exception to the general rule established in State ex rel. 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." (Appendix F, p. 4) The District Court's ruling implicitly overrules portions, if not all, of all its other decisions where it ruled that both compliance with Section 215.26 was "mandatory" and such mandatory compliance be "timely." See Florida Livestock Board v. Hygrade Food Products Corporation, 145 So. 2d 535 (Fla. 1st DCA 1962); Grunwald v. Department of Revenue, 343 So. 2d 973 (Fla. 1st DCA 1977); Exxon Corporation v. Lewis, 371 So. 2d 129 (Fla. 1st DCA 1978); Medley Investors, Ltd. v. Lewis, 465 So. 2d 1305 (Fla. 1st DCA 1985); and Hirsh v. Crews, 494 So. 2d 260 (Fla. 1st DCA 1986).

## STATEMENT OF THE ISSUES

I. Whether a Circuit Court has jurisdiction to hear a tax refund case when the taxpayer did not, and has not, filed an application with the Comptroller for a refund of monies held in the State Treasury, as required by Section 215.26, Florida Statutes?;

II. Whether a refund claim is barred when no refund application was filed with the Comptroller, and even no legal action was initiated, within the time period specified in Section 215.26(2), Florida Statutes?

## SUMMARY OF THE ARGUMENT

Requests for refunds of monies paid into the State Treasury are controlled, in procedure and remedy, by Section 215.26, Florida Statutes. Two conditions precedent to receiving a refund of monies from the State Treasury are that the taxpayer 1) make an application with the Comptroller, or his designee, and 2) make such an application, or take some legal action, within three (3) years of the right to the refund had accrued. The "right to a refund" accrues upon the date of the payment of the tax. If no refund request or other action are taken within the three (3) year period, the right to a refund is barred.

Respondents paid the $295.00 fee between July 1, 1990, and June 30, 1991. Each taxpayer's right to refund would have accrued on the date each person paid the fee. To seek a refund, a refund application, or some action, would have to have been filed by each taxpayer within three (3) of the date each person paid the fee to the Department of Highway Safety and Motor Vehicles ("DHSMV") or the tax collector agents. Section 215.26(2), Florida Statutes. The very last date a payer of the fee under Section 320.072(1)(b), Florida Statutes (1990 Supp.) to file a refund claim was June 30, 1994. Respondents filed this action on October 4, 1994.

Respondents have not to this date filed any refund request with the Comptroller or his designee, DHSMV. No action was taken within the three (3) period stated in

Section 215.26(2), Florida Statutes. Consequently, there has never been a "denial if refund." The Circuit Court properly dismissed the action as it did not have jurisdiction under Section 26.012(2)(e), Florida Statutes, since the time in which to seek a refund had already expired on June 30, 1994, and, thus the refund claim action was barred by the terms of Section 215.26(2), Florida Statutes. The District Court erred by reversing the trial court on this point of law.

## ARGUMENT

All the procedural requirements set forth by the Legislature in Section 215.26, Florida Statutes, **must** be fully, and timely, met before a taxpayer may receive a refund or seek judicial relief. One must follow the provisions of Section 215.26, Florida Statutes. The requirements of Section 215.26, Florida Statutes, are procedural, exclusive and mandatory, and failure to comply with all of the provisions bars a taxpayer from seeking judicial relief under all circumstances, except for the specific narrow exception provided in Kuhnlein. Since the Respondents failed to comply with any of the provisions of Section 215.26, Florida Statutes, Respondents are jurisdictionally barred from seeking a refund or acquiring judicial relief. The District Court below was in error in reversing the trial court's proper dismissal of the Respondents' action.

### I. ALL TAXPAYERS SEEKING A REFUND MUST FILE A REFUND APPLICATION, PURSUANT TO SECTION 215.26, FLORIDA STATUTES, WITH THE COMPTROLLER

#### A. THE LEGISLATURE, THROUGH SECTION 215.26, FLORIDA STATUTES, REQUIRES ALL TAXPAYERS SEEKING A REFUND TO FIRST APPLY FOR A REFUND FROM THE COMPTROLLER

##### *1. THE LEGISLATIVE PROCEDURAL REQUIREMENTS OF SECTION 215.26, FLORIDA STATUTES*

As this Court has often stated, a refund is a matter of grace and, in the absence

of an authoritative statute, no refund of monies paid to the State is possible.[7]/ North Miami v. Seaway Corp., 151 Fla. 301, 9 So. 2d 705 (1942); State ex rel. Victor Chemical Co. v. Gay, 74 So. 2d 560, 562 (Fla. 1954); Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295, 297 (Fla. 1967). Therefore, the only method by which a person who paid money to the State, and has had the money deposited in the State Treasury, can obtain a refund is by following the specific provisions of Florida's refund statute, Section 215.26, Florida Statutes.[8]/ The State makes this assertion because Section 215.26, Florida Statutes, is:

> the ***exclusive*** **procedure and remedy** for refund claims between individual funds and accounts in the State Treasury.

Section 215.26(4), Florida Statutes (e.s.). As the exclusive remedy/procedure by which an aggrieved taxpayer may obtain a refund from the State, the person seeking a refund **must** comply with Section 215.26, Florida Statutes.

The procedure for requesting a refund is set out in Section 215.26, Florida Statutes. Section 215.26(1), Florida Statutes, sets out the circumstances which give rise to a refund after taxes have been paid to the State. The grounds for a refund are:

a. An overpayment of any tax, license or account due;

b. A payment where no tax, license or account is due; and

c. Any payment made into the state treasury in error.

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[7]/ Prior to refund statutes, "[r]elief was restricted to cases in which the tax was illegal or void **and** also paid involuntarily or under duress." (e.s.) Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295, 297-298, n.4 (Fla. 1967), citing Brickell v. City of Miami, 103 So. 2d 206 (Fla. 3rd DCA 1958).

[8]/ The need to show "involuntary" payment was legislatively removed with the enactment of Section 215.26, Florida Statutes, in 1943. It does not matter today under the refund statute whether money was paid to the State voluntarily or involuntarily. See Reynolds Fasteners, Inc. v. Wright, 197 So. 2d, at 297 ("relief provided under [Section 215.26] is broader as they provide relief whether the tax was paid voluntarily or involuntarily").

Section 215.26(1), Florida Statutes.[9]/ However, even when a taxpayer has grounds for a refund, the taxpayer is required to follow the mandate of Section 215.26(2), Florida Statutes, which states:

> Application for refunds as provided by this section shall be **filed with the Comptroller**, . . ., within 3 years after the right to such refund shall have accrued else such right shall be barred. (e.s.)

Therefore, the first requirement in requesting a refund is to apply to the Comptroller. [10]/ Section 215.26(2), Florida Statutes, goes on and states that the agency responsible for collecting the tax will be the agency to receive the refund request. The agency receiving the refund request will make a determination if any money is due thereunder. Id. If the refund request is denied, then the agency must inform the taxpayer of its decision and the agency's reasons for the denial. Id.

2. *UNTIL KUHNLEIN, THIS COURT HAS CONSISTENTLY REQUIRED COMPLIANCE WITH SECTION 215.26, FLORIDA STATUTES EVEN WHERE THERE IS A CONSTITUTIONAL CHALLENGE.*

A review of all the case law clearly reveals that this Court, and many of the District Courts of Appeal, have consistently held, since 1926, that legislative conditions set forth in refund statutes **must** be complied with before initiating court action. In so deciding these cases, but without expressly so stating, the Petitioners would assert that this Court has held that following the requirements of Section 215.26, Florida Statutes, are "jurisdictional." Without compliance, this Court has not permitted refund cases to go

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[9]/ As just stated above, a constitutional attack on a tax is covered by subsections b and c of Section 215.26(1), Florida Statutes. State ex rel. Hardaway Contracting Co., Inc. v. Lee, 21 So. 2d, at 211.

[10]/ Section 215.26(2), Florida Statute, permits the Comptroller to delegate the authority to accept a refund request and to decide upon its validity. By Rule 3A-44.020(1), Florida Administrative Code, the Comptroller has exercised his discretion and delegated DHSMV to accept and determine refund requests for taxes and fees administered and collected by that agency. Consequently, in practice a taxpayer applies directly to DHSMV for a refund. Rule 3A-44.020(2), Florida Administrative Code.

forward.

As far back as 1926, this Court stated that the terms and conditions in refund statutes had to be followed. In Whitehurst v. Hernando County, 91 Fla. 509, 107 So. 627, 628 (1926), the Court had before it a question concerning a claims statute against counties, enacted by the Legislature (Section 2941 R.G.S. 1920). The statute provided that a claim must be presented to the county within one year from the time the claim becomes due and, if not timely presented, it is barred. Whitehurst, 107 So., at 627. Claimant had sued Hernando County over a claim. Because the claim was not alleged to be timely presented, the question was could the claimant seek the relief requested in a court of law. This Court answered in the negative, stating "[t]he statutory requirement is a prerequisite to the right of action against the county." Id., at 628. Without further discussion at the time, the Court extended the Whitehurst reasoning in its early Section 215.26 cases. See State, ex rel. Butler's Inc. v. Gay, 158 Fla. 164, 27 So. 2d 907 (1946); State, ex rel. Butler's Inc. v. Gay, 158 Fla. 500, 29 So. 2d 246 (1947); State, ex rel. Tampa Electric Company v. Gay, 40 So. 2d 225 (Fla. 1949).

This Court revisited the issue in detail in State ex rel. Victor Chemical Works v. Gray, 74 So. 2d 560 (Fla. 1954). The Court began its discussion of Section 215.26 with the basic premise of all refund law that:

> unless there is some statute which authorizes a refund or the filing of a claim for a refund, money cannot be refunded or recovered once it has been paid although levied under the authority of an unconstitutional statute.

Victor Chemical Works, 74 So. 2d at 562. This Court then recognized the legal fact that

> *Sometimes conditions are annexed to the right to a refund whch [sic] must be complied with, such as the making of the claim within a specified time.* It seems that defects in the form of sufficiency of the claim may be waived, but the statutory requirement that the claim be file in the prescribed time may not be waived. (e.s.)

Id. Two of those conditions are the filing of a refund request under Section 215.26(2),

Florida Statutes, and filing a refund application within the specified time. [11]/ Id.

Of particular importance, to this case and the issues herein, this Court, when addressing "exceptions" from a statute of non claim, stated clearly and succinctly **twice**:

> where no exemption from the provisions of a statute exist, the court is powerless to create one.
>
> the Court is powerless to change the words and clear meaning of the nonclaim statute
>
> As was stated in the case of Brooks v. Federal Land Bank of Columbia, supra, 'where no exception from the provisions of the statute exist, the court is powerless to create one.' The contention then that equity and good conscience require that the appellant not lose his claim, while very appealing, does not authorize us to change the statute

Victor Chemical, 74 So. 2d at 563, citing In re Woods Estate, 133 Fla. 730, 183 So. 10, 12 (1938), which itself relied on this Court's prior opinion in Brooks v. Federal Land Bank of Columbia, 106 Fla. 412, 143 So. 749, 753 (1932).

In a situation reminecent of the fact scenario here today, the Third District Court of Appeals, however, ruled after Victor Chemical that a taxpayer did not have to comply with refund statutes in order to receive a refund. Overstreet v. Frederick Cooper Co., 114 So. 2d 333 (Fla. 3rd DCA 1959). The First District Court of Appeal also faced the issue of procedural compliance with Section 215.26, Florida Statutes, in the case of Florida Livestock Board v. Hygrade Food Products Corporation, 145 So. 2d 535 (Fla. 1st DCA 1962). In that case, the Florida Livestock Board, a state agency, took the position that Section 215.26, and the statute's administrative procedures, controlled Hygrade's right to refund relief. Id., at 536. The Board contended that before Hygrade could seek relief in the courts, Hygrade first had to exhaust all the administrative procedures under Section 215.26. Id. The First District Court stated that Section 215.26 "is intended to provide an administrative procedure by which a person may

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[11]/ One of the holdings of Victor Chemical was that Section 215.26, Florida Statutes, is a statute of "non-claim" which had to complied with or the refund claim was forever barred.

secure a refund of monies paid by him into the treasury of this state, . . ." Id., at 537.

The District Court went on to hold that **before** Hygrade:

> was entitled to seek relief in the court of this state for return of the inspection fees illegally exacted of it by the Board under the circumstances shown by this record, it was first required to exhaust the administrative remedies afforded it by F.S. Sec. 215.26, F.S.A., by filing the appropriate application for refund with the Comptroller within [the time specified in Section 215.26] after the rights to refund had accrued. (e.s.)

Id., at 538. The District Court then held that:

> 'Since Hygrade failed to exhaust its administrative remedy by filing an application for refund of the inspection fees paid by it pursuant to the provisions of and within the time required by the statute, its right to the relief prayed for in its complaint is barred.'

Id. Thus, the requirement to file an application when seeking a refund is mandatory. [12]/

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[12]/ The exclusivity of the procedures in Section 215.26, Florida Statutes, are further supported by the decisions interpreting Section 215.26 as a statute of non-claim rather than a statute of limitations. The cases clearly state that the taxpayer's refund request is barred, pursuant to Section 215.26(2), Florida Statutes, if the refund application is not made within the three (3) year time period specified in Section 215.26. If a taxpayer can be barred from receiving its tax refund if not made within three years of paying the tax, then the filing of a refund request, pursuant to Section 215.26, must be necessary before proceeding to trial. This Court reached that conclusion as part of the Victor Chemical decision. 74 So. 2d at 562. A statute of non-claim runs until a refund application is submitted. As the Court stated:

> "[T]he statutory requirement that the claim be filed in the prescribed time may not be waived."
>
> 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. A refund is a matter of grace and if the statute of non-claim is not complied with, the statute becomes an effective bar in law and equity. (e.s.)

Victor Chemical, 74 So. 2d, at 562 (citations omitted). Accord Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814 (Fla. 1988); State, ex rel. Tampa Electric Company v. Gay, 40 So. 2d 225, 228 (Fla. 1949). The Court reiterated the rule that "where no exemption from the provision of a non-claim statute exists, a court is powerless to create one." Id., at 563.

The First District Court of Appeals also recognized the non-claim time requirement in both Devlin. There, the Court of Appeal stated:

> However, Florida requires a taxpayer to apply for a refund of illegally imposed taxes within a certain time period and unless this is done, no refund is available. (e.s.)

Devlin, 305 So. 2d at 850. See also Stewart Arms Apartments, Ltd. v. State, Department of Revenue, 362 So. 2d 1003 (Fla. 4th DCA 1978); Florida Livestock Board, 145 So. 2d at 538 and 540.

The issue of procedural compliance by taxpayers came back before this Court in Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295, 197 (Fla. 1967). The idea behind the legislative compliance requirement is to avoid costly litigation if the refund is granted by the affected agency. This Court stated:

> The statutes here involved provide a full and adequate remedy avoiding the necessity of litigation if refund is granted by the comptroller and if not, contemplating use of all existing court remedies.

Reynolds Fasteners, Inc. v. Wright, 197 So. 2d, at 297.[13]/

This Court then sought to resolve the conflict between Florida Livestock Board v. Hygrade Food Products and Overstreet v. Frederick Cooper Co. as to whether a taxpayer had to first comply with Section 215.26, Florida Statutes, before going to court. This Court resolved that conflict when it stated:

> There are a number of these refund statutes applying to various tax payments and other refund claims. [Section 215.26 identified in Fn. 3 as one such statutes] This focuses attention on the **necessity to comply** with the provisions as exhausting administrative remedies. All of the above statutes provide that the claim must be filed with the state comptroller. (e.s.)

Reynolds Fasteners, 197 So. 2d, at 297. This Court noted the conflict over the "necessity to comply with these statutes." Id. This Court agreed with the First District Court's decision in Florida Livestock Board v. Hygrade Food Products, rejecting the contrary conclusion reached in Overstreet v. Frederick Cooper Co., supra, by stating:

> [t]he statutes here involved provide a full and adequate remedy avoiding the necessity of litigation if refund is granted by the comptroller and if not, contemplating use of all existing court remedies.

Reynolds Fasteners, 197 So. 2d, at 297. Thus, it is clear that one MUST first comply

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[13]/ The Legislature's requirement to proceed first to an agency is not a "futile act." Stone v. Errecart, 675 A.2d 1322 (Vt.1996) is not atypical. The taxpayer, in a income tax refund case, argued that the filing of a refund request "would be futile." The Vermont Supreme Court rejected that assertion as the futility doctrine has "no place, however, in the face of a clear legislative command that exhaustion is required." The Vermont Supreme Court ruled that the words "exclusive remedy of a taxpayer with respect to the refund of monies" was such a legislative command requiring exhaustion of the legislative procedure. Id. at 1325.

with the exclusive procedural requirements of Section 215.26, Florida Statutes, before proceeding to initiate an action within the jurisdiction of a circuit court.[14]/

In summation, the filing of a refund application and the timely filing of the application requirements contained within Section 215.26, Florida Statutes, are mandatory conditions precedent to any refund action being filed in a circuit court. Accord Whitehurst v. Hernando County, 91 Fla. 509, 107 So. 627, 628 (1926) [statutory requirement is a prerequisite to a right of action]; Kahl v. Board of County Commissioners of Dade County, 162 So. 2d 522, 523 (Fla. 3rd DCA 1964). These conditions are jurisdictional; without full compliance with Section 215.26, a circuit court has no jurisdiction to hear the refund case. Id. Since Respondents are seeking a refund of fees paid under Section 320.072, Florida Statutes, they were required to allege in their Complaint, in addition to the payment of the fee, that they:

a. applied under Section 215.26, Florida Statutes, for a refund to DHSMV;

b. filed their application for a refund within three (3) years of the date of the payment of the fee to DHSMV. Section 215.26(2), Florida Statutes; and

c. were denied their timely filed refund request by DHSMV.

Since Respondents did not, the trial court was correct in dismissing the action and the District Court erred in reversing the trial court's decision.

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[14]/ This Court's rulings on mandatory compliance have been, until this case, followed without exception. See Stewart Arms Apartments, Ltd. v. Department of Revenue, 362 So. 2d 1003 (Fla. 4th DCA 1978); E.W. Wright v. Reynolds Fasteners, Inc., 184 So. 2d 699 (Fla. 3rd DCA 1966), affirmed as modified, Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295 (Fla. 1967); Kahl v. Board of County Commissioners of Dade County, 162 So. 2d 522 (Fla. 3rd DCA 1964); State ex rel. Devlin v. Dickinson, 305 So. 2d 848 (Fla. 1st DCA 1975); Grunwald v. Department of Revenue, 343 So. 2d 973 (Fla. 1st DCA 1977); Exxon Corporation v. Lewis, 371 So. 2d 129 (Fla. 1st DCA 1978); and Medley Investors, Ltd. v. Lewis, 465 So. 2d 1305 (Fla. 1st DCA 1985).

3. *FEDERAL AND OTHER STATE LAWS ARE CONSISTENT WITH SECTION 215.26, FLORIDA STATUTES*

A review of the Internal Revenue Code and the statutes of other states reveals refund laws with nearly identical procedural requirements, both filing and timely filing, that are present in Section 215.26, Florida Statutes. In interpreting these statutes under the same circumstances as presented here, the United States Supreme Court, the lower federal courts and the courts of other states require, just as this Court did under Victor Chemical, that refund claims must be filed, and filed timely, in accordance with the controlling refund statute or the refund claim will not be heard.

The Internal Revenue Code has a statute that specifically requires the filing of a claim for a refund of federal taxes or the federal court has no jurisdiction to hear the matter. 26 U.S.C. Section 7422(a) states in full:

> No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, **until a claim for refund or credit has been duly filed with the Secretary**, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. (e.s.)

With the clear language of Section 7422 present, it is no surprise that federal case law is replete with cases holding that taxpayers are required to file a claim for refund with the Secretary of Treasury prior[15]/ to bringing suit and may not file a suit in district court to obtain tax refund until such claim is filed. See, e.g., Huff v. U.S., 10 F.3d 1440 (9th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2706 (1994 ); Republic Petroleum Corp. v. U.S., 613 F.2d 518 (5th Cir. 1980). Stated succinctly, the timely

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[15]/ Taxpayer's alleged filing of refund claim after commencing suit did not satisfy statutory requirement that claim for refund be filed prior to filing suit against United States. Arnett v. U.S., 845 F.Supp. 796 (D.Kan.1994).

filing of a proper claim for refund is a jurisdictional prerequisite to a refund suit.[16]/ Commissioner of Internal Revenue v. Lundy, ___ U.S. ___, 116 S.Ct. 647, 651 (1996); United States v. Dalm, 494 U.S. 596, 601-02, 110 S.Ct. 1361, 1364-65 (1990). See also, e.g. Firsdon v. U.S., 95 F.3d 444 (6th Cir. 1996); Humphreys v. U.S., 62 F.3d 667 (5th Cir. 1995); Chicago Milwaukee Corp. v. U.S., 40 F.3d 373, 375 (Fed. Cir. 1994); Goulding v. U.S., 929 F.2d 329, (7th Cir. 1991), cert. denied, 506 U.S. 865, 113 S.Ct. 188 (1992); Curasi v. U.S., 907 F.Supp. 373 (M.D. Fla.1995). The lack of a timely filed refund claim deprives the district court of subject matter jurisdiction in suit for refund of taxes. Beckwith Realty, Inc. v. U.S., 896 F.2d 860 (4th Cir. 1990); Gustin v. U.S. I.R.S., 876 F.2d 485 (5th Cir. 1989); Beckman v. Battin, 926 F.Supp. 971 (D.Mont. 1995). Necessity for filing claim to recover taxes paid as prerequisite of suit is not dispensed with because claim may be rejected. United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 51 S.Ct. 376 (1931); Bohn v. U. S., 467 F.2d 1278 (8th Cir. 1972).

Like this Court stated in Reynolds regarding the purpose of Section 215.26, Florida Statutes, requiring that a federal tax refund claim meet the filing requirements of 26 U.S.C.A. Section 7422(a) serves to prevent surprise and to give Internal Revenue Service adequate notice of a claim and its underlying facts so that it can make an administrative investigation and determination regarding the claim. Boyd v. U.S., 762 F.2d 1369 (9th Cir. 1985). The purpose of the filing requirement is to assist in the administrative handling of claims for a refund and, when fully presented, optimistically to avoid the necessity of filing a civil action. Dahlgren v. U. S., 553 F.2d 434 (5th Cir. 1997).

States, like the United States, also have refund statutes. These state statutes likewise require the filing of refund claims prior to permitting a lawsuit to be filed. Stone

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[16]/ IRS may not waive congressionally mandated requirement that refund claim be timely filed as a jurisdictional prerequisite to a refund suit. Goulding v. U.S., 929 F.2d at 332.

v. Errecart, 675 A.2d 1322 (Vt. 1996) [32 Vermont Statutes Section 5884 - 3 year period to file a refund claim - filing mandatory]; Matteson v. Director of Revenue, 909 S.W.2d 356, 360 (Mo. 1995) [Sections 143.801 and 143.821, Missouri Statutes - mandatory statutory prerequisites to receive a refund];Bradley v. Williams, 195 W.Va. 180, 183-84, 465 S.E.2d 180, 183-84 (1995)[West Virginia Code Section 11-10-14 - "Unequivocal mandate" to comply with refund statute - 3 year period]; Kuhn v. Department of Revenue, 897 P.2d 792 (Colo.1995) [Section 39-21-108(1), Colo. Stat. - mandatory filing or claim barred]; Atkins v. Department of Revenue 320 Or. 713, 894 P.2d 449, 454 (1995) [Oregon Revised Statutes Section 305.765 - refund statute addressing only invalidated taxes]; Commonwealth of Kentucky v. Gossum, 887 S.W.2d 329, 334-335 (Ky. 1994) [Kentucky Revised Statutes Section 134.590 - refund statute addressing only tax statutes held to be invalid, 2 year limitation]. See also Stallings v. Oklahoma Tax Commission, 880 P.2d 912 (Okl 1994); Bailey v. State, 330 N.C. 227, 412 S.E.2d 295 (1991); Swanson v. State, 335 N.C. 674, 441 S.E.2d 537 (1994).

B. REFUND CLAIMS BASED UPON THE UNCONSTITUTIONALITY OF THE CHALLENGED TAX MUST ALSO BE FILED IN ACCORDANCE WITH SECTION 215.26, FLORIDA STATUTES.

The fact that the refund claim of the Respondents is based upon the theory that the impact fee is unconstitutional does not alter the fact that the a refund claim must be filed in accordance with Section 215.26, Florida Statutes. This Court long ago resolved that question in State ex rel. Hardaway Contracting Co., Inc. v. Lee, 155 Fla. 724, 21 So. 2d 211 (1945). In Lee, a taxpayer was attempting to receive a refund of taxes paid under a statute this Court had ruled invalid. Id., at 211. This Court stated that:

> The Legislature of 1943 enacted Chapter 22008, F.S.A. §215.26, authorizing moneys paid into the State Treasury when no tax, license, or account is due or when any payment was made into the State Treasury in error.

Id. The Court ruled that the refund of moneys paid under an invalid law were "within the class entitled to refund under Chapter 22008." Id. In describing Chapter 22008

(Section 215.26, Florida Statutes) in detail as applied to a request for a refund based on the invalidity of a tax statute, the Hardaway Court stated:

> Chapter 22008 provides for refunds in three different categories, to-wit: (a) In case of an overpayment of any tax, license, or account due, (b) a payment when no tax, license, or account is due, and (c) any payment made into the State Treasury in error, and appropriates 'from the proper respective funds from time to time such sums as may be necessary for such refunds.' Since Chapter 17178 was declared to be a nullity, **relator may claim his refund under category b and c of Chapter 22008.**

Id. Therefore, a claim that a tax, fee, surcharge or any other money paid to the State under an illegal or unconstitutional statute falls under either (b) or (c) of Section 215.26(1), Florida Statutes. See also Op. Atty. Gen. Fla. 78-14 (1978).

This Court followed the Hardaway ruling in Victor Chemical, supra. Victor Chemical was an original mandamus proceeding where the taxpayer sought a refund of use taxes previously paid. The taxpayer in Victor Chemical sought a refund because the tax statute in question was held unconstitutional by this Court in Thompson v. Intercounty Tel. & Tel. Co., 62 So. 2d 16 (Fla. 1952). This Court, as set out in more detail above, required that all of the refund procedures of Section 215.26, Florida Statutes be met.

The United States Supreme Court has also determined that refund claims under a statute of nonclaim require the filing of a refund application even when the constitutionality of the tax is being challenged. In McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 45, n. 28, (1990), the United States Supreme Court noted its prior approval of time bars, such as Section 215.26(2), Florida Statutes, where refunds of unconstitutionally collected taxes are not timely sought. The Supreme Court has also interpreted the present time limitation statute, 26 U.S.C. Section 6511, and its predecessors, to apply to taxpayers who allege that federal taxes have been "illegally" imposed. Rosenman v. U.S., 323 U.S. 658, 65 S.Ct. 536 (1945); Kavanagh v. Noble, 332 U.S. 535, 68 S.Ct. 235 (1947) ["All income tax refund claims,

irrespective of reason therefor, must be filed within three years from the filing of income tax return or within two years from payment of income tax under Section 322(b)(1) [I.R.C.1939 (now this section) ] and Section 3313 [I.R.C.1939 (now this section and Section 5705 of this title) ], providing that claims for refunding of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, etc."] See also Jones v. Liberty Glass Co., 332 U.S. 524, 68 S.Ct. 229 (1947); McMahon v. U.S., 172 F.Supp. 490 ( D. R.I. 1959) ["The filing of timely claim for refund is statutory prerequisite to suit to recover taxes alleged to have been illegally collected."]

Other state courts have also ruled that regardless that the taxpayer is asserting that the tax is unconstitutional, the taxpayer must apply for a refund and be denied by the appropriate state official before proceeding to court. See, e.g. Stone v. Errecart, 675 A.2d 1322 (Vt. 1996); State of Arkansas v. Staton, 934 S.W. 2d 478, 480 (Ark. 1996) (citing City of Little Rock v. Cash, 277 Ark. 494, 504-505, 644 S.W.2d 229, 233 (1982)).

In the case of State of Indiana v. Sproles, 672 N.E.2d 1353 (Ind. 1996), the Indiana Supreme Court stated the issue as "must a taxpayer pursue statutory remedies in order to challenge a listed tax as violating the U.S. Constitution, or may the taxpayer bypass [the state's tax procedures] by filing the action in a circuit court." id. at 1356 and 1361. That court concluded no, finding that the proper procedure was to pay the tax, seek a refund and be so denied before proceeding to the tax court. Id. at 1357. As to the arguments of "futility," lack of authority in the administrative agency, or that an agency could not disregard statutes the court said these are legislative considerations. Id. at 1359-60. Further, the court found that challenging the constitutionality of a tax after a refund denial was an adequate remedy at law.

C. LEGISLATIVE PROCEDURAL MANDATES MUST BE FOLLOWED

1. PROCEDURAL REQUIREMENTS GENERALLY

When a legislative body creates mandatory statutory conditions precedent to the initiation of judicial review, compliance with those legislative conditions **must** be met.[17/] This Court has ruled that such a legislatively created remedy first must be sought before resorting to the court. In Florida Welding & Erection Service, Inc. v. American Mutual Insurance Co. of Boston, 285 So. 2d 386, 389-390 (Fla. 1973), this Court had before it the question of the constitutionality of Section 627.291(2), Florida Statutes, which stated in pertinent part:

> If the rating organization or insurer fails to grant or rejects such request within thirty days after it is made, the applicant may proceed in the same manner as if his application had been rejected. Any party affected by the action of such rating organization or insurer on such request may, within thirty days after written notice of such action, appeal to the department . . .

In holding that Section 627.291(2), Florida Statutes, and its legislatively required method of review, was constitutional, this Court stated:

> Where a method of appeal from an administrative ruling has been provided, such method must be followed to the exclusion of any other system of review. Where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the courts will act.")

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[17/] There is a vast difference between the judicially created doctrine of "exhaustion of administrative remedies" and legislatively "mandate" administrative procedures and remedies. The requirement to follow legislative administrative mandates should not be confused with the judicially created doctrine of "exhaustion of administrative remedies." For example, cases arising under Chapter 120, Florida Statutes, the doctrine of exhaustion of administrative remedies is not a legislatively created requirement but a "court-created prudential doctrine; it is a matter of policy, not power." State, Department of Revenue v. Brock, 576 So. 2d 848, 850 (Fla. 1st DCA), rev. denied, 584 So. 2d 997 (Fla. 1991). See also Lambert v. Rogers, 454 So. 2d 672, 674 n.5 (Fla. 5th DCA 1984) Being a court-created deference, the exhaustion of administrative remedies is not jurisdictional. Brock, at 850. However, a legislatively mandated exhaustion requirement, differs markedly from Chapter 120. By Section 215.26, the Legislature has chosen to make exhaustion in a refund case mandatory. This is particularly important since section 215.26 is a limited waiver of sovereign immunity and its terms and conditions should be strictly construed and enforced, before a refund of monies can be granted to a claimant by the state.

Florida Welding & Erection Service, Inc., 285 So. 2d at, 389-390. [18]/ See also Odlham v. Foremost Dairies, Inc., 128 So. 2d 586, 593 (Fla. 1961). Other examples of legislative conditions precedent can be found in Sections 578.26, and 112.3187 Florida Statutes. Both statutes require specified administrative procedures before jurisdiction can be invoked by proceeding to court. See Ferry-Morse Seed Co. v Hitchcock, 426 So. 2d 958 (Fla. 1983)[19]/; Ujcic v. City of Apopka, 581 So. 2d 218 (5th DCA 1991) ["an aggrieved public employee can seek judicial remedies only "after exhausting all available contractual or administrative remedies."]

2. PROCEDURAL REQUIREMENTS AND SOVEREIGN IMMUNITY; THE REQUIREMENT THAT THE PLAINTIFF POSSESS "PROCEDURAL" STANDING, AS WELL AS "SUBSTANTIVE" STANDING, BEFORE INITIATING AN ACTION AGAINST THE STATE.

Florida is protected by the doctrine of sovereign immunity. Article X, Section 13, Florida Constitution. This Court has long recognized the State's absolute sovereign immunity absent a waiver by the Legislature or constitutional amendment. 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). The immunity possessed by the State is "absolute and unqualified." Hampton v. State Board of Education, 105 So. at 326.

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[18]/ The requirement to follow the legislative procedure and remedy is not unique to Florida. It has been held before that where a legislature makes a procedure and remedy mandatory or mandated, then the exhaustion of that procedure must occur before an aggrieved party can proceed to court, even when there is a constitutional challenge present. See, e.g., McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ["Where Congress specifically mandates, exhaustion is required." citations omitted]; Neff v. State, 116 N.M. 240, 861 P.2d 281 (N.M App. 1993).

[19]/ "In order to assert a statutory cause of action, the claimant must comply with all valid condition precedents; for an action cannot be properly commenced until all essential elements of the cause of action are present. 1 Fla.Jur.2d Actions Sec. 30 (1977). The right to recover against the seed dealer is conditioned upon the aggrieved farmer's compliance with the administrative complaint and notice requirements of section 578.26(1)." Ferry-Morse, 426 So. 2d at 961.

Where the Legislature has set forth specific conditions that must be met before the State's sovereign immunity is waived, those conditions also must be met. In State ex rel. Florida Dry Cleaning and Laundry Board v. Atkinson, 136 Fla. 528, 188 So. 834, 838 (1939), this Court stated:

> . . . no suit may be maintained against [the State or its agencies] where the interest of the State in such suit is through some contract or property right, except by consent of the State, which consent may only be effectuated by legislative Act. Such consent can be extended to operate no further than the limitation, if any, which may be prescribed by the legislature in its grant of consent.

Florida Dry Cleaning and Laundry Board v. Atkinson, 188 So. at 838. Furthermore, this Court concluded on the same page:

> With the wisdom or policy of a legislative Act *limiting the scope of the State's consent to be sued*, the courts have no voice. (e.s.)

The State's primary example of a combination of legislative procedural requirements and the absence of "procedural" standing when such legislative procedural requirements are not complied with is Section 768.28, Florida Statutes. Section 768.28 is the Legislature's waiver of the State's sovereign immunity in torts. Section 768.28 contains specific **procedural** requirements that must be met by the injured party before the State may be sued in tort, even when the plaintiff has admittedly been injured by the State's negligence.

Section 768.28, Florida Statutes, entitled "Waiver of Sovereign Immunity in Tort Actions," states, in pertinent part:

> (1) In accordance with s. 13, Art. X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages . . . state, may be prosecuted *subject to the limitations* specified in this act. (e.s.)

What are some of these "limitations?" Subsection (5) limits the amount of the monetary award and denies the use of punitive damages. Subsection (6) is especially relevant to the issue here. Important limitations on tort actions against the State are:

> (6)(a) An action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency, and also, except as to any claim against a municipality or the Spaceport Florida Authority, presents such claim in writing to the Department of Insurance, within 3 years after such claim accrues and the Department of Insurance or the appropriate agency denies the claim in writing;
>
> (b) For purposes of this section, the requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action but shall not be deemed to be elements of the cause of action and shall not affect the date on which the cause of action accrues.

Where these requirements of Section 768.28, Florida Statutes, are not met, the claim against the State is barred and no waiver of immunity is found. This Court has expressed its view in Menendez v. North Broward Hospital District, 537 So. 2d 89 (Fla. 1989) where it noted that subsection 768.28(6) "requires" three things prior to instituting an action against a state agency:

> First, the claimant must present the claim to the agency in writing. Second, the claimant must present the claim to the Department of Insurance in writing. Third, the claim proffered to the Department must be presented within three years after it accrues and the agency or the Department denies the claim in writing.

Menendez, 537 So. 2d at 91 (emphasis added). Earlier, in Levine v. Dade County School Board, 442 So. 2d 210, 212 (Fla.1983), this Court said that language in Section 768.28(6), Florida Statutes, is clear and must be strictly construed "[b]ecause this subsection is part of the statutory waiver of sovereign immunity...." See also Hamide v. State, Department of Corrections, 584 So. 2d 136 (Fla. 1st DCA 1991); Hansen v. State, 503 So. 2d 1324 (Fla. 1st DCA 1987). C.f. Metropolitan Dade County v. Coats, 559 So. 2d 71 (Fla. 3rd DCA), rev. denied, 569 So. 2d 1279 (Fla. 1990).

The filing of the "notice of claim" with the "appropriate state agency" is akin to Section 215.26, Florida Statutes', requirement to file a refund claim with the Comptroller. The courts of this State have been consistent, if no notice of claim is filed with the state agency, the injured plaintiff is procedurally barred from proceeding with

the action in court. Wright v. Polk County Public Health Unit, 601 So. 2d 1318, 1319 (Fla. 2nd DCA 1992); Hansen v. State, 503 So. 2d at 1326 ("notice is a condition precedent to the maintenance of a cause of action against a State agency or subdivision, . . ."). Accord Smart v. Monge 667 So. 2d 957, 959 (Fla. 2nd DCA 1996) ("Because Section 768.28 is a statutory waiver of sovereign immunity, it must be strictly construed." citing Levine v. Dade County Sch. Bd., 442 So. 2d 210 (Fla.1983)). See also, Diversified Numismatics, Inc. v. City of Orlando, 783 F.Supp. 1337 (M.D. Fla.), affirmed, 723 F.2d 1442 (11th Cir. 1990) [Section 768.28(6), Florida Statutes, is a condition precedent to maintaining lawsuit; lack of such an allegation in complaint will lead to dismissal]. And where an injured party attempts to file a notice of claim **after** the 3 year period to file a claim has run, that claim will be forever barred.

A court action for a refund claim, like a court action for a tort claim, is a suit against the State. [20]/ Since Section 768.28, Florida statutes, is considered a waiver of the State's immunity in torts, Section 215.26, Florida Statutes, must be considered the State's[21]/ waiver of immunity for tax refunds.[22]/

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[20]/ See Bailey v. State, 330 N.C. 227, 412 S.E.2d 295 (1991)

[21]/ The United States also considers its refund claim law, 26 U.S.C. Section 7422, to be a waiver of the United States' immunity. United States v. Michel, 282 U.S. 656, 51 S.Ct. 284 (1931) ["By this section, authorizing suit for tax refund, United States waived sovereign immunity from suit."] See also Kuznitsky v. U.S., 17 F.3d 1029, 1031 (7th Cir. 1994) ["The United States has consented to such a suit, but has also imposed conditions on its consent. Among the conditions the government has imposed is the requirement that the party seeking the refund initially file an administrative claim with the IRS."]; Mallette Bros. Const. Co., Inc. v. U.S., 695 F.2d 145 (5th Cir. 1983), rehearing denied 701 F.2d 173, cert. denied, 464 U.S. 935, 104 S.Ct. 341(19 ) ["In suits for tax refunds, the United States has consented to be sued but only when taxpayer follows statutory conditions."]; Vintilla v. U.S., 767 F.Supp. 249 (M.D. Fla.1990), affirmed, 931 F.2d 1444 (11th Cir 1991), rehearing denied, 942 F.2d 798 (11th Cir 1991) [Statutes providing for tax refund suit waive sovereign immunity of the United States, and thus the statutes are jurisdictional and the limitations and conditions of those statutes must be strictly observed and cannot be waived.]

[22]/ See State of Arkansas v. Staton, 934 S.W.2d 478 (Ark. 1996); Bailey v. State, 330 N.C. 227, 412 S.E.2d 295 (1991); Matteson v. Director of Revenue, State of

(continued...)

In either case, both statutes must be strictly construed. Like an injured party must meet the requirements of Section 768.28, Florida Statutes, so too must the taxpayers meet the requirements of Section 215.26, Florida Statutes, in order to receive a refund. Section 215.26, Florida Statutes, grants legislative permission to a taxpayer to sue the State "after" a claim for a refund has been filed and denied by the Comptroller. There must be full compliance with this statute, like there is with Section 768. 28 Florida Statutes, before sovereign immunity is waived.

Further support for the proposition that the procedural requirements of Section 215.26, Florida Statutes, must be met before the State's sovereign immunity is waived and suit can be brought is found in Section 26.012(2)(e), Florida Statutes, granting jurisdiction to the circuit courts. Section 26.012(2)(e), Florida Statutes (1991), states specifically that circuit courts shall have exclusive original jurisdiction:

> (e) In all cases involving legality of any tax assessment or toll or denial of refund, except as provided in s. 72.011. (e.s.)

Thus, a circuit court does not acquire jurisdiction in a tax refund case unless and until a **denial of refund** comes from the Comptroller.

3. THERE ARE SOUND POLICY AND FISCAL REASONS TO REQUIRE THE FILING OF REFUND CLAIMS BEFORE PROCEEDING TO COURT.

Intimately commingled with the doctrine of sovereign immunity in tax cases is the sound fiscal public policy of Florida. Throughout the years, with one exception, this Court has ruled that a taxpayer must comply with the statutory requirements of Section 215.26, Florida Statutes. While not so expressly stating, this Court's decisions requiring the procedures of Section 215.26, Florida Statutes to be followed places the government on notice of the claim and informs it that it may be required to refund the money; consequently, it should make appropriate financial allowances.

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[22](...continued)
Missouri, 909 S.W.2d 356, 360 (Mo. 1995).

This unstated reasoning underlying this Court's cases is sound. When taxes are paid to a government they are deposited into that government's general revenues and ordinarily are spent within that tax year. However, when the government is put on notice that it may be required to refund those taxes, it can make the appropriate allowance for a possible refund. However, if this Court were to allow refunds for taxes paid in previous years, and for which no refund claim was ever filed, or filed out of time, it would jeopardize current and future governmental operations because current and future funds might be necessary for the refund.[23]/ Cases, such as this, often involve millions of dollars; a rather negative fiscal impact.

## II. TAX REFUND CLAIMS ARE BARRED WHERE THE INDIVIDUAL CLAIM WAS NOT FILED WITHIN THE TIME SPECIFIED FOR FILING A REFUND CLAIM CONTAINED IN SECTION 215.26(2), FLORIDA STATUTES

### A. CLAIMS FOR REFUNDS MUST BE TIMELY FILED

*1. Section 215.26(2), Florida Statutes, and the Decisions of this Court.*

Under Section 215.26(2), Florida Statutes, the Respondents are absolutely and unequivocally time barred from requesting any refund more than three (3) years (5 years for payment of the tax after September 15, 1994) from the date of payment of the fee under Section 320.072(1)(b), Florida Statutes. Respondents are barred from requesting a refund of taxes as they each paid the fee more than three years before any refund application has been filed by them or they initiated this lawsuit. All purported class members are likewise barred since three years passed since the date of their payment of the fees under Section 320.072(1)(b), Florida Statutes, and the final date on which they could have filed a claim for a refund, June 30, 1994.

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[23]/ In Kuhnlein, over $150,000,000 was refunded. No refund claims were ever filed there. At that time the State had a "rainy" day fund. It no longer has the fund available due to the refunds paid. The State, cannot suffer such situations where unplanned refunds are required to be paid without causing havoc to the fiscal condition of the state.

As set forth above, Respondents were required to follow the mandate of Section 215.26(2), Florida Statutes, which states:

> Application for refunds as provided by this section shall be filed with the Comptroller, . . ., **within 3 years** after the right to such refund shall have accrued[24]/ else such right shall be barred.

This means that a taxpayer MUST file a refund application with the proper agency or the Comptroller within three (3) years of the date of the payment of the contested tax or fee or be forever barred from seeking and being awarded a refund.

In Victor Chemical Works, supra, this Court interpreted Section 215.26, Florida Statutes, as a ***statute of non-claim*** rather than a statute of limitation. A statute of non-claim runs until a refund application is submitted. As this Court stated:

> "[T]he statutory requirement that the claim be filed in the prescribed time may not be waived."
>
> 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. A refund is a matter of grace and if the statute of non-claim is not complied with, the statute becomes an effective bar in law and equity. (e.s.)

Victor Chemical, 74 So. 2d, at 562 (citations omitted). Accord Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814 (Fla. 1988); State, ex rel. Tampa Electric Company v. Gay, 40 So. 2d 225, 228 (Fla. 1949). In fact, this Court thought issue resolved earlier, stating "State ex rel. Butler's, Inc., v. Gay, 158 Fla. 164, 27 So. 2d 907 (1946), and State ex rel. Butler's, Inc., v. Gay, 158 Fla. 500, 29 So. 2d 246, 247 (1946), appear to have settled the question by holding that failure to file **written claim**, sworn to

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[24]/ This Court, in Victor Chemical, directly addressed the meaning of the term "accrued." This Court stated the issue succinctly there; "[i]t becomes important in this case to determine when the right to a refund 'accrued'." Id. at 561. After holding that Section 215.26, Florida Statutes, was a statute of non-claim, as opposed to a statute of limitations, this Court stated:

> 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.

Victor Chemical, 74 So. 2d at 562.

on a form to be prescribed by the Comptroller, within [the time prescribed in Section 215.26, Florida Statutes] from the date of the payment barred the claim." Victor Chemical, 74 So. 2d at 563. [25]/

Because of the nature of a statute of non-claim, the time to file for a refund is not tolled while the pleader tries some other form of action. A statute of non-claim is not like a statute of limitations that can be tolled. This Court made that clear in Victor Chemical, 74 So. 2d, at 562 ("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 determined.").

Finally, this Court reiterated the rule that "where no exemption from the provision of a non-claim statute exists, a court is powerless to create one." Victor Chemical, 74 So. 2d, at 563.[26]/

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[25]/ In 1974, the First District Court of Appeal recognized the non-claim time requirement of Section 215.26, Florida Statutes, and this Court's interpretation of the statute in Devlin, supra. There, the First District stated:

> However, Florida requires a taxpayer to apply for a refund of illegally imposed taxes within a certain time period and unless this is done, no refund is available. (e.s.)

Devlin, 305 So. 2d at 850. Four year later, the Fourth District Court of Appeal also recognized the three year time bar in the case of Stewart Arms Apartments, Ltd. v. State, Department of Revenue, 362 So. 2d 1003 (Fla. 4th DCA 1978). In that case, three persons who paid intangible taxes sought a refund from the Comptroller because the amount of the taxes eventually exceeded the correct amount of tax due on the underlying intangible. Id., at 1004. The Comptroller denied their applications because it was not made within three years of the date the taxes were paid. Id. The Governor and Cabinet, sitting as the Department of Revenue upheld the denial of the refund and the Fourth District affirmed. Quoting Section 215.26(2), Florida Statutes, and citing Victor Chemical, that court held that "a claim for refund of taxes must be made within a stated time after the refund accrues, the time period commences when the tax is paid." Stewart Arms Apartments, 362 So. 2d, at 1005.

[26]/ Yet the First District, despite this language and its own language in Devlin, ruled that this Court's decision in Kuhnlein created a "general exception" to Section 215.26, Florida Statutes. Public Medical Assistance Trust Fund, et al. v. Hameroff, 22 Fla. Law Weekly D497d (Fla. 1st DCA February 18, 1997). The state has filed a motion for rehearing and rehearing en banc, which is under consideration by the First District.

*2. Timely Filing Under Federal and State Law*

When the question of the timely filing of a refund claim has come before other federal and state courts, those courts have required taxpayers to individually meet the "timely" filing requirement of their respective refund statutes, or else those taxpayers would be procedurally barred from seeking a refund.

The Internal Revenue Code specifically addresses the time in which a refund claim must be filed. 26 U.S.C. Section 6511 states:

> (a) Period of limitation on filing claim.--Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.
> (b) Limitation on allowance of credits and refunds.--
> (1) Filing of claim within prescribed period.--No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

"In absence of some indication to the contrary, the court must assume that the language of Section 322(b)(1) [I.R.C.1939 (now 26 USCA Section 6511)], prescribing the time for the making of claims for overpayments of income taxes and for other taxes erroneously or illegally assessed or collected, was intended to be given its ordinary meaning." Jones v. Liberty Glass Co., 332 U.S. 524, 68 S.Ct. 229 (1947). Periods of non claims limitations are established to cut off rights, justifiable or not, that might otherwise be asserted, and such periods of limitation must be strictly adhered to by the judiciary. Kavanagh v. Noble, 322 U.S., at 539. And like 215.26, Florida Statutes, the limitations period in 26 U.S.C. Section 6511, governing tax refund claims. is jurisdictional in nature and cannot be waived. Commissioner of Internal Revenue Lundy, ___ U.S., at ___, 116 S.Ct. 647, 651 (1996); Gabelman v. C.I.R., 86 F.3d 609 (6th Cir. 1996); Zeier v. U.S. I.R.S., 80 F.3d 1360 (9th Cir. 1996). Tax refund claims not

filed within to non claim limitations period cannot be maintained, regardless of whether tax is alleged to have been erroneously, illegally or wrongfully collected. U.S. v. Dalm, 494 U.S. 596, 110 S.Ct. 1361 (1990). See also Kreiger v. U. S., 539 F.2d 317 (3rd Cir. 1976).

Within the past year, the United States Supreme Court has decided two cases concerning the timely filing requirements under the Internal Revenue Code. The most recent decision was on February 18, 1997, when the United States Supreme Court decided the case of United States v. Brockamp, ___ U.S. ___ , 117 S.Ct. 849 (1997). The issue before the Supreme Court was somewhat similar to that faced by this Court in Victor Chemical - was there an exception from the clear statutory time limit in the refund statute. In Brockamp, the Supreme Court had to resolve a split in the circuit over the question of whether there existed an implied exception, called "equitable tolling," when the language of 26 U.S.C. Section 6511 did not expressly provide for such an exception. Brockamp, 117 S.Ct. at 850-51. The Supreme Court resolved the difference, in somewhat the same manner as this Court did in Victor Chemical, by ruling there was no such thing in 26 U.S.C. Section 6511 as "equitable tolling." The Supreme Court began its discussion of Section 6511, and the express limit period by stating "Section 6511 sets forth it time limitations in unusually emphatic form." Brockamp, 117 S.Ct. 851. The Court continued on with its examination of Section 6511 and noted the many times that Congress set forth in "highly detailed technical manner." Id. In coming to the same conclusion of this Court that "where no exemption from the provision of a non-claim statute exists, a court is powerless to create one," the Supreme Court stated"

> To read an "equitable tolling" provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc. Moreover, such an interpretation would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery--a kind of tolling for which we have found no direct precedent. Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions,

> taken together indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote. There are no counter- indications. Tax law, after all, is not normally characterized by case specific exceptions reflecting individualized equities.
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> * * *
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> To read an "equitable tolling" exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for "equitable tolling" which, upon close inspection, might turn out to lack sufficient equitable justification.
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> * * *
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> At the least it tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.

Id. at 852. Finally, the Court stated, in justification of its position:

> The nature and potential magnitude of the administrative problem suggest that Congress decided to pay the price of occasional unfairness in individual cases (penalizing a taxpayer whose claim is unavoidably delayed) in order to maintain a more workable tax enforcement system.

Id. at 852.

The case of Commissioner of Internal Revenue v. Lundy, ___ U.S. ___, 116 S.Ct. 647 (1996), concerned the timely filing of a refund request to receive a refund under the federal tax code in the Tax Court. While discussed in dicta, since Section 6511 was not directly at issue because the case was not brought in the district court, the Supreme Court made a definitive statement about Section 6511 and cases brought in district and the effect failure to follow Section 6511 would have. The Court stated that Section 6511 makes a "timely filing of a refund claim a jurisdictional prerequisite to bringing suit." Lundy, ___ U.S., at ___, 116 S.Ct., at 651 and 653. This reveals two important points. First, a refund claim must be filed with the IRS. Second, the refund claim must be timely. The failure of either of these two requirements mandates dismissal because they are a "jurisdictional prerequisite" to a lawsuit in district court. Id.

In the past few years, especially in cases arising out of the United States Supreme Court's decision in Davis v. Michigan Department of Treasury, 489 U.S. 803, 109 S.Ct. 1500 (1989)[27]/, states have been faced with refund suits from taxpayers affected by the Davis decision. Many of these taxpayers did not file claims with their state department of revenue. Consistently, the state courts have been holding that those taxpayers who individually did not follow the state's statutory refund procedures, and especially the limitations of time in which to file for a refund, are barred from seeking a refund.

In Bailey v. State, 330 N.C. 227, 412 S.E.2d 295 (1991) there was a class of federal retirees seeking the Davis refunds. The North Carolina Supreme Court denied refunds. The court stated North Carolina law required individual timely compliance with the refund statute, stating that "each member must individually satisfy the conditions precedent to suit mandated in [the refund] statute." Id. 412 S.E.2d at 301 n.3 See also Id. at 302, n.4. The supreme court denied the plaintiffs' refund action because they each had not complied with the conditions precedent to bringing suit against the department of revenue. The Supreme Court repeated its holding in Swanson v. State, 335 N.C. 674, 441 S.E.2d 537 (1994). This was another group of federal retirees. They too had not individually timely filed a refund request under North Carolina law. The court stated "[w]e conclude plaintiffs are procedurally barred from recovering in this action the refunds sought because they did not comply with the State's statutory postpayment refund demand procedure." Id. 441 S.E.2d at 540.[28]/ The following are

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[27]/ The Davis case concerned the differential income tax treatment of the retirement income between state and federal retirees. The United States Supreme Court ruled that states could not differentiate as they had done. This then lead to a deluge of refund claims in many states having state income taxes.

[28]/ The North Carolina Supreme Court also rejected the contention that such state procedural requirements violate the McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990) mandate of a clear and certain remedy

(continued...)

other state court decisions where taxpayers were denied refunds, even when the tax had been declared unconstitutional, since the taxpayers did not timely file for a refund and complying with the precautions for a referred action under state law. Atkins v. Department of Revenue 320 Or. 713, 894 P.2d 449 (1995); Commonwealth of Kentucky v. Gossum, 887 S.W.2d 329 (Ky. 1994); Stallings v. Oklahoma Tax Commission, 880 P.2d 912 (Okl 1994); Kuhn v. Department of Revenue, 897 P.2d 792 (Colo.1995). Accord Aronson v. Commonwealth, 401 Mass. 244, 516 N.E.2d 137,144 (1987) ( tax on banks alleged as unconstitutional - "tax collectors and other public officials . . . are entitled to insist on adherence to fixed schedules for timely application for abatement and for other steps in the administrative process")

B. BECAUSE SECTION 215.26, FLORIDA STATUTES, IS A STATUTE OF NONCLAIM AND THE CHALLENGE OF A TAX BY ANOTHER PARTY DOES NOT TOLL THE TIME IN WHICH TO FILE A REFUND CLAIM, EACH REFUND CLAIM MUST BE INDIVIDUALLY FILED TO TOLL THE RUNNING OF THE STATUTE OF NONCLAIM

The Petitioners assert that in order for a taxpayer to toll the running of the time period in the statute of nonclaim, Section 215.26(2), Florida Statutes, each and every taxpayer seeking a refund must individually file their own refund claim within the time period specified in Section 215.26, Florida Statutes. Petitioners' assertion is consistent with the clear language of Section 215.26, Florida Statutes, and this Court's holding in Victor Chemical that the challenge of a tax by one taxpayer does not toll the running of the statute of nonclaim for others who may have paid the same tax or fee.[29]/

Section 215.26(1), Florida Statutes, states in pertinent part,

> The comptroller of the state may refund **to the person who paid same**, or his heirs, personal representatives or assigns, any moneys paid into

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[28](...continued)
because the United states Supreme Court had approved of state procedural requirements to limit fiscal impact. Swanson, 441 S.E.2d at 545.

[29]/ As will be shown shortly, this individual claim filing requirement is nearly universal with all the states's refund statutes.

the state treasury . .

These words would indicate that the Legislature intended that refund claims be personal to those who paid the fee or tax or those who the taxpayer personally permitted to stand in the taxpayers shoes in seeking a refund.

The California Supreme Court addressed the question of "individual" in Woosley v. State, 3 Cal.4th 758, 838 P.2d 758 (1992). In that case payers of a tax upon motor vehicles bought outside the state were assessed a tax not placed on cars bought in the state. The plaintiffs sought and were granted the right to bring a class action by the lower court, without individually complying with the state's refund statute. The California Supreme Court reversed, finding that such an action was not permitted by the refund statute as each individual seeking a refund must each file a refund application. Id. 838 P.2d, at 775. The California refund statute, like Florida's, required personal applications for a refund, required the filing to be made within three years of the payment of the tax, and made the individual filing of a refund a condition precedent to the filing of a suit. Id. 838 P.2d, at 776. See also Bailey v. State, 412 S.E.2d, at 301 [Even a class action sought, each class member must individually file a claim under the statute]; Swanson v. State, 441 S.E.2d, at 540-542 [same]; Wisconsin Department of Revenue v. Hogan, 198 Wis.2d 792, 815-816, 543 N.W.2d 825, 834-835 (Ct. of App. 1995) [Section 71.75 Wisc. Stats. - requires individual to file each refund claim, class action overturned for this reason].

In reviewing the filing requirement of 26 U.S.C. Section 7422, the Court of Claims held that the timely filing of a refund claim with IRS by one of 13 persons contesting taxability of profits on sale of partnership interest did not relieve nonfiling taxpayers of obligation to file administrative claim before the nonfiling taxpayers could file a refund suit or proceeding or relieve the nonfiling taxpayers the requirement that the refund claim be filed within three years from time return is filed or two years from

time tax is paid, notwithstanding that issue was common to all taxpayers. Barenfeld v. U. S., 442 F.2d 371, 194 Ct.Cl. 903 (Ct.Cl. 1971).

Florida's refund statute, Section 215.26, Florida Statutes, requires that a refund application be made by the applicant, "the person who paid same," and the notice of any denial will be made to the applicant. Section 215.26(1), Florida Statutes. The requirement that the refund can only be made by the person who paid the money into the Treasury, or that person's "heirs, personal representation, or assigns" means that no one else can apply for a refund of monies paid to the State by another. This comports with this Court's rulings in Victor Chemical. Until the person who paid the money into the Treasury, or the representative, authorized by Section 215.26(2), Florida Statutes, makes an application to the Comptroller or his designee, the time period continues to run and is not tolled.

## CONCLUSION

Respondents never have filed a refund claim under Section 215.26, Florida Statutes. The time to file such a refund claim has passed, expiring on June 30, 1994. This lawsuit was not even initiated until October 2, 1994. The Respondents are absolutely barred by Section 215.26, Florida Statutes, from applying for or receiving a refund of monies they individually paid into the State Treasury.

Thus, for the reasons stated above, the Fourth District Court of Appeal erred, as a matter of law, in reversing the trial court's dismissal of Respondents' Complaint and Amended Complaint. This Court should reverse the District Court's opinion, reaffirm Victor Chemical and require the strict compliance of all the provisions of Section 215.26, Florida Statutes, prior to the initiation of any refund suit in circuit court.

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: **FREDERICK D. HATEM**, Esquire, 1549 SE Westmoreland Boulevard, Port St. Lucie, Florida 34952, this 21 day of March, 1997.

ERIC J. TAYLOR