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' REPLY BRIEF

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SUMMARY OF ARGUMENT

This case is not controlled by this Court's decision in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). Kuhnlein is restricted to the specific narrow facts and circumstances of that case and the holdings of that case do not apply generally to the tax refund process.

There exists confusion amongst the district courts, like the Fourth District below, as to the limited nature of this Court's decision in Kuhnlein. This confusion, if not corrected, will lead to vast exceptions to the strict, express language of Section 215.26, Florida Statutes. The State requests that this Court clarify its Kuhnlein decision so that all courts, both circuit and district, understand that Section 215.26, Florida Statutes, remains in full force and effect. Further, this Court should clarify its decision in Kuhnlein so that **all** taxpayers, no matter the grounds, are required to comply with the mandatory express provisions of Section 215.26, Florida Statutes, in the filing of a refund request prior to the initiation of a suit.

Respondents presented no argument whatsoever why and how Kuhnlein controls this case. The Respondents did not address the State's argument about the express and specific words of the Legislature contained in Section 215.26, Florida Statutes. Respondents did not state how unspecific language in Kuhnlein could be taken beyond the narrow facts and circumstances of that case. The Respondents did not reply to the unanswered question they propose when they assert that no refund claims need be filed by them. The Respondents did not support their argument that this Court's definition of "accrued" in Victor Chemical, infra, as being the date when "paid" must be replaced with the date this Court invalidates a tax. Finally, the Respondents do not address the Petitioners' arguments that each and every class member must file for a refund and receive a denial or be forever barred. They do not explain how a statute

of nonclaim would work if one taxpayer could seek a refund for others who have not appeared.

Respondents are barred from presenting this argument as Respondents did not raise this issue below and is clearly not within the confines of the certified question. Respondents are under the impression that McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), mandates a refund of taxes illegally extracted under all circumstances. That is simply not the case. If the state taxing statute is found unconstitutional, state law determines the taxpayer's appropriate remedy or relief consistent with due process. Furthermore, in fashioning the appropriate remedy, the states are free to raise any procedural bars or reliance interests which may prevent retroactive relief.

ARGUMENT

The State reaffirms its position that the Court should answer the certified question in the following manner:

> This Court did not overrule or recede from State ex rel. Victor Chemical v. Gay, 74 So. 2d 560 (Fla. 1954), Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295 (Fla. 1967), or any of this Court's other decisions concerning Section 215.26, Florida Statutes, when it decided Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). Section 215.26, Florida Statutes, must be fully complied with. A taxpayer is required to both file a refund claim, and file that claim timely, pursuant to Section 215.26, Florida Statutes, or the taxpayer is barred from receiving a refund.

I. THIS COURT SHOULD CLARIFY ITS DECISION IN DEPARTMENT OF REVENUE v. KUHNLEIN BECAUSE THERE EXISTS CONFUSION AMONGST THE DISTRICT COURTS AS TO THIS COURT'S HOLDING IN THAT DECISION

A. DEPARTMENT OF REVENUE v. KUHNLEIN

Contrary to the Respondents' assertion, this case is not controlled by this Court's decision in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). The State made that clear in its Initial Brief. The State believes that Kuhnlein is restricted to the

specific narrow facts and circumstances of that case and the holdings of that case do not apply generally to the refund process. The State upholds this belief because this Court in Kuhnlein, did **not**:

1. declare Section 215.26, Florida Statutes, unconstitutional or invalid in any manner or under any circumstance;

2. overrule or recede from Victor Chemical or Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295 (Fla. 1967), or this Court's other decisions that have interpreted Section 215.26, Florida Statutes, and have upheld the legislatively mandated requirement that in order to receive a refund, a timely refund application must be filed;

3. create some "exception" to the legislatively mandated requirement that all taxpayers must timely file a refund application or be forever barred; and

4. address the question of timeliness of filing a refund claim.

The State seeks review because there exists confusion among the district courts, like the Fourth District below, as to the limited nature of this Court's decision in Kuhnlein. This confusion, if not corrected, will lead to vast exceptions to the strict, express language of Section 215.26, Florida Statutes. While the Third District has followed Section 215.26, Florida Statutes, and Victor Chemical in Westring v. Department of Revenue, 682 So. 2d 171 (Fla. 3rd DCA 1996)[1/], the First District, joining the Fourth District, has expressed its position in Public Medical Assistance Trust Fund, et al., v. Hameroff, 22 Fla. Law Weekly D497d (Fla. 1st DCA February 18, 1997), that the refund process and Section 215.26, Florida Statutes, has been altered by

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[1/] For this Court's information, the Third District Court of Appeal issued an opinion (copy attached) in the case of State, Department of Revenue v. Bauta, Case No. 96-224 (April 23, 1997) that follows the Westring opinion. The District Court reversed a final judgment in a class certified tax refund case because Mr. Bauta had not filed a claim for a refund in accordance with Section 215.26, Florida Statutes. This opinion come after the decision in this case and Hameroff.

Kuhnlein.[2]/

The State requests that this Court clarify its Kuhnlein decision so that all courts, both circuit and district, understand that Section 215.26, Florida Statutes, remains in full force and effect. Further, this Court should clarify its decision in Kuhnlein so that **all** taxpayers, no matter the grounds, are required to comply with the express provisions of Section 215.26, Florida Statutes, in the filing of a refund request prior to the initiation of a suit.[3]/

On the flip side, the Respondents presented no argument whatsoever why and how Kuhnlein controls this case. The Respondents did not address the State's argument about the express and specific words of the Legislature contained in Section 215.26, Florida Statutes. Respondents did not state how unspecific language in Kuhnlein could be taken beyond the narrow facts and circumstances of that case and be read as finding that statute unconstitutional, invalid, or inapplicable in certain refund cases or read as voiding more than 50 years of this Court's rulings upholding Section 215.26, Florida Statutes.

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[2]/ 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." Hameroff , 22 Fla. Law Weekly at D497d. The State sought rehearing but was denied on March 27, 1997. Notice to Seek Discretionary Review by this Court was timely filed on April 14, 1997.

[3]/ While this Court held that McKesson and the other liquor wholsalers challenging the constitutionality of the liquors statutes "clearly have standing to assert their constitutional right to engage in interstate commerce free of burdens violative of the commerce clause," Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation v. McKesson Corp., 524 So.2d 1000, 1003(Fla. 1988), McKesson and the others made that challenge after complying with Section 215.26, Florida Statutes. Mckesson, 524 So. 2d, at 1009-1010. This Court again noted the fact McKesson complied with Section 215.26, Florida Statutes, in Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation v. McKesson Corp., 574 So.2d 114, 115 (Fla. 1991).

The Respondents did not reply to the unanswered question they propose when they assert that no refund claims need be filed by them. If the Respondents do not have to file a refund claim, will there even be a statute of non-claim? If there is a statute of non-claim, when will the statute of non-claim begin to run and for how long? The State asserts that this Court did not void the timely filing of a refund claim, pursuant to Section 215.26, Florida Statutes, in Kuhnlein. Nor did this Court create some unspecified, unlimited period in which to seek a refund. This Court knew well what fiscal chaos that would cause. Unlike in its brief before the Fourth District, the Respondents did not present their argument that the Victor Chemical definition of "accrued" as being the date when "paid" must be replaced with the date this Court invalidates a tax. This was the very argument rejected by this Court in Victor Chemical. Yet the Respondents, and the two deciding District Courts, the Fourth District in the instant case and the First District in Hameroff, believe the refund process was changed by this Court's decision in Kuhnlein. This Court cannot permit Respondents' argument to be accepted as there will be no limit to the time a refund can be requested.[4]/

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[4]/ The Third District Court of Appeal accurately summarized why there is a need for a definitive time period in which to seek a refund in Wright v. Reynolds Fasteners, Inc., 184 So. 2d 699 (Fla. 3rd DCA 1966), affirmed in part, reversed in other part on other grounds, 197 So. 2d 295 (Fla. 1967). That court upheld the requirement to timely file a refund claim, stating as the reason:

> In view of the nature of public revenues and for stability in budget planning, there should be some cut-off date when claims for taxes paid under protest may be returned. This would be in accordance with prior rulings of appellate courts in this State, wherein they have denied recovery for return of taxes when there has been no compliance with the provisions of a non-claim statute. See: Whitehurst v. Hernando County, 91 Fla. 509, 107 So. 627 (1926); Kahl v. Board of County Commissioners of Dade County, 162 So. 2d 522 (Fla. 3rd DCA 1964); State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954).

Wright v. Reynolds Fasteners, Inc., 184 So. 2d, at 700.

Finally, the Respondents do not address the Petitioners' arguments that each and every class member must file for a refund. They do not explain how a statute of non-claim would work if one taxpayer could seek a refund for others who have not applied. This would be both contrary to the holding of this Court in Victor Chemical, where time is not tolled for one taxpayer while another challenges a tax, but it would also violate this Court's holding in State ex rel. Szabo Food Services, Inc., of North Carolina v. Dickinson, 286 So.2d 529, 532 (Fla. 1973) where this Court stated "[o]ne who does not himself bear the financial burden of a wrongfully extracted tax suffers no loss or injury, and accordingly, would not have standing to demand a refund."

The State urges this Court to issue an opinion which upholds the clear and unambiguous language of Section 215.26, Florida Statutes. Kuhnlein does not apply to this case nor does it apply as a general rule of law on refunds and the refund process. It should be strictly limited to the narrow facts and circumstances of that one case only.

B. "ACCRUED" IN SECTION 215.26(2), FLORIDA STATUTES, MEANS THE DATE A TAX WAS "PAID"

Respondents argue to this Court that Petitioners did not present an explanation of what the word "accrued" means in Section 215.26(2), Florida Statutes. This Court answered that question clearly in State ex rel. Victor Chemical v. Gay, 74 So. 2d 560 (Fla. 1954). "Accrued" means "the date the taxes were paid." Id. 74 So. 2d at 563-564. However, Respondents attempt to get around this Court's ruling by asserting in the trial court (R:) and before the District Court, that there was, and is, no need to file a refund request before a judicial determination that the underlying tax is declared invalid. Stated succinctly, Respondents argued that a cause of action in a tax refund case "accrues" from the date a tax is declared invalid and not the date the taxes were paid. Respondents' assertion is that the time in which to file a refund claim with the Comptroller for those people who paid the impact fee under Section 320.072(1)(b),

Florida Statutes (1990 Supp.), will not begin to run until a court declares Section 320.072(1)(b), Florida Statutes, unconstitutional. What Respondents argue for is neither a statute of non-claim nor a statute of limitations. If an allegation that a tax is invalid is confirmed, anyone who has ever paid the tax would have three years from the date of the court decision to file for a refund. Thus, someone who has paid a tax in 1960 would have as much right, under Respondents' theory, to seek a refund as one who paid the same tax in 1993, all having three years in which to file a refund claim from the date the tax is declared unconstitutional. This theory is not supported in law.

Section 215.26(2), Florida Statutes (1993), states, in pertinent part

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

Florida law interpreting Section 215.26(2), Florida Statutes, clearly holds that the cause of action, setting the time in which a refund claim must be filed under Section 215.26, Florida Statutes, "accrues" from date the tax is **paid**.

The very issue raised by the Respondents was raised and answered, contrary to Respondents' assertions, directly by this Court in State ex rel. Victor Chemical v. Gay, supra. Victor Chemical concerned the legality of a use tax paid by Victor Chemical. Id., 74 So. 2d, at 561. The tax was challenged by another party and found to be invalid. Id., citing, Thompson v. Intercounty Tel. & Tel. Co., 62 So. 2d 16 (Fla. 1952). Victor Chemical was not a party to the Thompson case. Victor Chemical, 74 So. 2d at 561. In 1953, the time in which to file for a refund under Section 215.26, Florida Statutes (1953), was 1 year. Victor Chemical last paid the tax in May, 1951 but did not file for a refund until July, 1953, after the Thompson decision. Victor Chemical, at 561. Victor Chemical claimed that "his right to a refund did not accrue until the final determination of the suit in the case of Thompson v. Intercounty Tel. & Tel. Co., supra, . . . " Victor

Chemical, at 561. The then Attorney General, Richard Ervin, asserted that the time to file for a refund "accrued at the time of the payment of such tax, irrespective of the time of the final determination of the legality of the tax . . . " Id.

This Court stated the issue succinctly; "[i]t becomes important in this case to determine when the right to a refund 'accrued'." Id. After holding that the refund statute, 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, at 562. This Court also cited its earlier cases of State ex rel Butler's Inc. v. Gay, 158 Fla. 500, 29 So. 2d 246 (1949)[5]/ ["The effect of the opinion in this second Butler case was that the right to a refund of taxes illegally paid accrued when the taxes were paid"] and State ex rel. Tampa Electric Co. v. Gay, 40 So. 2d 255, 227 (1949) ["the right to a refund is barred under Section 215.26, Florida Statutes, unless a claim is filed with the Comptroller within one year from the date of payment:"] to support its decision in Victor Chemical. Id., 74 So. 2d, at 563-564.[6]/

As to Victor Chemical's assertion, like the Respondents here, that "he did not know that his right to do so had accrued until there was a final determination of the legality of the tax," this Court retorted "[t]his contention is without merit." Id., 74 So. 2d,

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[5]/ The taxes in question in Butler were found to be unconstitutional. However, since no claim for a refund of the 1946 taxes was made within the statutory 1 year period, Butler was denied its refund claim for the 1946 taxes. Victor Chemical, 74 So. 2d at 564.

[6]/ District Courts followed this Court's lead Victor Chemical. See Stewart Arms Apartments, Ltd v. State, Department of Revenue, 362 So. 2d 1003, 1005 (Fla 4th DCA 1978) ["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.*"] (e.s.); Grunwald v. Department of Revenue, 343 So. 2d 973, 974 (Fla. 1st DCA 1974).

at 564.

> The taxpayer had the right to pay the tax and then seek refund after it was paid . . .
>
> It knew the tax had been imposed.
>
> It knew that it paid the tax.
>
> It failed to file any claim or take any action within one year of the time of the payment 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.

Victor Chemical, 74 So. 2d, at 565.

While the Respondents wish to attack the validity of Section 320.072(1)(b), Florida Statutes (1990 Supp.), Respondents may do so only within the prescribed time period mandated by the Florida Legislature in Section 215.26(2), Florida Statutes, in which to bring an action. Respondents seek to have this Court abolish all statutes of non-claims or limitations when it comes to taxes. Respondents' requested relief would have this Court overrule Victor Chemical and now rule that no cause of action for a refund of taxes paid "accrues" until this Court rules that a tax is invalid. This Court should decline Respondents' invitation and, instead, reaffirm Section 215.26(2), Florida Statutes, and this Court's ruling in Victor Chemical that "accrued" means "the date when the taxes were paid."[7]/

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[7]/ Respondents other two arguments under Point I should be rejected out of hand. First, the 1994 amendments to Section 215.26(2), Florida Statutes, extending the time period to 5 years, was to apply "prospectively." See, Hassen v. State Farm Mutual Auto Ins., 674 So. 2d 106, 108 (Fla. 1996). Therefore, the new period only applies to taxes paid "after September 30, 1994." Section 215.26(2), Florida Statutes (1995). Since the Respondents all paid the fee prior to June 30, 1991, they are not affected by the amendment. Further, this extension only applies to taxes covered by Section 72.011, Florida Statutes. Taxes paid under Chapter 320, Florida Statutes, are not covered by Section 72.011, Florida Statutes.

Second, Chapter 96-243, Laws of Florida, is a claims bill. A claims bill is a method where the Legislature can waive the immunity of the State and pay a stale claim. This bill is **not**, however, a general waiver of the legislative mandatory

(continued...)

II. REQUIRING A TAXPAYER TO MEET STATE PROCEDURAL REQUIREMENTS FOR A REFUND ARE NOT VIOLATIVE OF FEDERAL CASE LAW

MOTION TO STRIKE

On the date this Reply Brief is filed, the Petitioners have moved to strike Respondents' Point II of their Answer Brief. As set out in Petitioners' Motion, issues not raised in the pleadings cannot be presented for the first time on appeal. See, e.g. Murphy v City of Port St. Lucie, 666 So. 2d 879 (Fla. 1995). This Court has long taken that position. Forty years ago, in Mariani v. Schleman, 94 So. 2d 829 (Fla. 1957), this Court stated:

> It is a rule of long standing that on appeal *this Court will confine itself to a review of those questions, and only those questions, which were before the trial court.* Matters not presented to the trial court by the pleadings and evidence will not be considered by this court on appeal. Jacques v. Wellington Corporation, 134 Fla. 211, 183 So. 718; Southern Liquor Distributors v. Kaiser, 150 Fla. 52, 7 So. 2d 600. (e.s.)

Mariani v. Schleman, 94 So. 2d at 831; Dober v. Worrell, 401 So. 2d 1322, 1323-1324 (Fla. 1981); Morales v. Sperry Rand Corp, 601 So. 2d 538, 540 (Fla. 1992); McGurn v. Scott, 596 So. 2d 1042, 1043 n.2 (Fla. 1992).

Respondents did raise the issue presented in Point II below to any of the two lower courts and neither of the two lower courts addressed this issue in their respective opinions. While the Court should strike Point II, Petitioners will briefly respond to this argument to briefly inform the Court of the Petitioners' position.

RESPONSE

Respondents are under the impression that McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), **mandates** a refund of taxes

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(...continued)
requirements of Section 215.26, Florida Statutes, or a waiver of the conditions precedent to filing a refund action.

illegally extracted under all circumstances. That is simply not the case. What the Respondents have misunderstood is the difference between "retroactive" application of the law and the "remedy," if any, the aggrieved taxpayer is to receive. As the United States Supreme Court stated in McKesson, and later cases, state law controls the "remedy" and state jurisdictional and procedural statutes can bar a "remedy" even if the tax was illegally extracted.

The Court held in McKesson that when a State requires a taxpayer to remit their taxes in a timely fashion, before challenging the validity of the tax, "federal due process principles . . . require the State's postdeprivation procedure to provide a 'clear and certain remedy,' . . . for the deprivation of tax moneys in an unconstitutional manner." McKesson, 496 U.S., at 51 (citation omitted). However, the Supreme Court did not end its analysis there. That Court went on to describe that a state, in order to protect its fiscal position:

> A State's freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions;

McKesson, 496 U.S., at 45. In fact, the United States Supreme Court cited Section 215.26, Florida Statutes, as a proper procedural statute. McKesson, 496 U.S., at 45, n.28.[8]/

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[8]/ Footnote 28 states:
See Ward v. Love County Board of Comm'rs, 253 U.S., at 25, 40 S.Ct., at 422 (recognizing refund claim could be barred if there was "any valid local [limitations] law in force when the claim was filed"); see also Fla.Stat. § 215.26(2) (1989) (generally applicable 3-year limitations period for tax refund actions).

The United States Supreme Court further clarified the federal-state comity policy that state courts determine the appropriate remedy when a state tax is held unconstitutional in James B. Beam Distilling Co., v. Georgia, 501 U.S. 529, 111 S. Ct. 2439 (1991). The Supreme Court reiterated its McKesson holding that "the remedial inquiry is one governed by state law." James B. Beam, 501 U.S., at 535. In remanding the case back to the Georgia courts to determine the appropriate remedy, the Court stated:

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

James B. Beam, 501 U.S., at 544 (citation omitted).

Since the James B. Beam decision, the United States Supreme Court has adhered to its analysis that federal law determines the retroactive application of rule of law, while state law determines the appropriate remedy to be given when the United States Supreme Court finds a state taxing statute unconstitutional. See Harper v. Virginia Dept. of Taxation, 509 U.S. 86, 100, 113 S.Ct. 2510, 2519 (1993)(holding that the Supreme Court would not enter a judgment because state courts must provide relief consistent with due process principles); and, Fulton Corp., v. Faulkner, __ U.S. __, 116 S.Ct. 848, 862 (1996)(holding that state law fashions remedy for taxpayer).

Based on McKesson and James B. Beam, the rule of law on remedy is clear. If the state taxing statute is found unconstitutional, state law determines the taxpayer's appropriate remedy or relief consistent with due process. Furthermore, in fashioning the appropriate remedy, the states are free to raise any procedural bars or reliance

interests which may prevent retroactive relief.[9]/

As previously stated in the State's Initial Brief, state courts have required the following of that state's procedural laws before a refund may be issued, even in a McKesson type of case. Stone v. Errecart, 675 A.2d 1322 (Vt. 1996); Matteson v. Director of Revenue, 909 S.W.2d 356, 360 (Mo. 1995); Bradley v. Williams, 195 W.Va. 180, 183-84, 465 S.E.2d 180, 183-84 (1995); Kuhn v. Department of Revenue, 897 P.2d 792 (Colo.1995); Atkins v. Department of Revenue 320 Or. 713, 894 P.2d 449, 454 (1995); 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 period]. 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).

In this case, Section 215.26, Florida Statutes, is a procedural bar to the Respondents receiving a refund. Even if Section 320.072(1)(b), Florida statutes (1990 Supp.) were to be declared invalid, it is too late to seek a refund because no refund claim was filed with the Comptroller within three (3) years of the date the Respondents

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[9]/ The conclusion that State courts may raise any procedural bars or reliance issues in determining the appropriate relief to be granted to a taxpayer after a state tax statute is struck as unconstitutional is found in the subsequent history of James B. Beam Distilling Co., v. Georgia, 501 U.S. 529, 111 S.Ct. 2439 (1991). On remand from the Supreme Court, the Georgia Supreme Court denied James Beam Company a refund on two basis: 1) James Beam Company, a manufacturer did not pay the tax, and thus, lacked standing to challenge tax; and 2) James Beam Company's failure to use "predeprivation" procedures under Georgia law to challenge the tax waived the right to obtain a refund for taxes paid. James B. Beam Distilling Co v. State, 437 S.E. 782, 786 (Ga. 1993).

paid the fee.[10]/

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, three years from the date the last taxes paid under Section 320.07(1)(b), Florida Statutes (1990 Supp.). 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 with all of 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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[10]/ Likewise, Section 72.011, Florida Statutes, is a procedural bar even if the allegation by the taxpayer is the tax is unconstitutional. If the taxpayer fails to challenge an assessment or the denial of a refund within 60 days of the final agency action, the taxpayer is forever barred. State, Department of Revenue v. Ray Construction of Okaloosa County, 667 So. 2d 859 (Fla. 1st DCA 1996). Accord Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814 (Fla. 1988); Bystrom v. Diaz, 514 So. 2d 1072 (Fla. 1987).

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 28th day of April, 1997.

ERIC J. TAYLOR

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