ORIGINAL

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' SUPPLEMENTAL BRIEF

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The issue presented by the Respondents' and Amicus' Point II is plain and simple -

> May a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity--a rule containing certain procedural requirements for any tax assessment or refund suit--nonetheless bar a taxpayers' refund suit, irrespective of the invalidity of the underlying tax?

This issue has been decided adversely to their position. Unless the independent rule violated some other provisions of the Constitution, "it could independently bar the taxpayers' refund claim." McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 45, 110 S.Ct , 2245 (1990); Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, __, 115 S.Ct. 1745, 1750 (1995).

The instant case concerns whether Sec. 215.26, Fla. Stat., a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity--a rule containing certain procedural requirements for any refund suit, bars the Respondents' action because none of the Respondents filed a claim within 3 years from the date of the payment of their fee.[1]/ McKesson and its prodigy do not provide otherwise.

I. A PRE-EXISTING, SEPARATE, INDEPENDENT RULE OF STATE LAW, HAVING NOTHING TO DO WITH RETROACTIVITY--A RULE CONTAINING CERTAIN PROCEDURAL REQUIREMENTS FOR ANY TAX ASSESSMENT OR REFUND SUIT--CAN BAR A TAXPAYERS' REFUND SUIT, IRRESPECTIVE OF THE INVALIDITY OF THE UNDERLYING TAX.

A. MCKESSON DOES NOT MANDATE REFUNDS

Respondents' and Amicus' (jointly "Respondents") primary focus in their briefs, in Point II and otherwise, is that Section 215.26, Fla. Stat., (Florida's refund procedural statute), and State ex rel. Victor Chemical v. Gay, 74 So. 2d 560 (Fla. 1954) (upholding the mandatory refund procedures), have been overruled by McKesson, claiming there is a "pre-McKesson" and "post McKesson" line of cases. However, Respondents totally misunderstand the meaning of

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[1]/ Amicus further implicate Sec. 72.011(2), Fla. Stat., in their case as the vast majority of that taxpayer class received a final assessment of taxes from the Department of Revenue and **never** challenged the assessment within the 60 day "jurisdictional" time period.

McKesson, and the later cases of the United States Supreme Court on this point. Respondents are convinced that McKesson has rewritten the rule on refunds thus arguing that McKesson overrules state "procedural" statutes in all cases where a state tax statute is found to be invalid.

The Respondents are incorrect in their reading and interpretation of McKesson. Respondents' confusion lies in their misunderstanding of the differences between a "rule of law" and the "remedy" that may be available to a taxpayer. What McKesson stands for, in part, is that when a case is decided by the United States Supreme Court, the "rule of law" decided by the United States Supreme Court is to be given retroactive effect to all cases whose res judicata, jurisdictional time limits or other procedural requirements, have not run. See, e.g., James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 534-535, 111 S.Ct. 2439, 2433 (1991).

The Supreme Court cases do not stand for the proposition that a state must, as a matter of federal law, provide retroactive "remedies." Under McKesson, the procedural requirements and the remedial relief to be afforded a taxpayer after a tax is invalidated is a matter of state law. See, Fulton Corporation v. Faulkner, __ U.S. __, 116 S.Ct. 848, 86-862 (1996).

Respondents' confusion began in McKesson. The Supreme 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, even though Respondents and others believe the Supreme Court did. Florida had argued that it should not have to pay McKesson a refund, that a refund would cost Florida a lot of money. Id., at 44-45. The Supreme Court rejected Florida's concerns stating that in order to protect its fiscal position, a state may enact laws to protect it's fiscal integrity.

> 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 . . . **enforce relatively short statutes of limitations**

applicable to such actions.[2]/ (e.s.)

McKesson, 496 U.S., at 45.[3]/ Continuing on, the Court said "[t]he State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax."[4]/ Id. Later in the opinion, again referring to Florida's argument of uncertain fiscal protection, the Court restated its position:

> And in the future, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitation applicable to refund actions. See supra, at 44-45. Such procedural measures would sufficiently protect States' fiscal security when weighed against their obligation to provide meaningful relief for their unconstitutional taxation.

Id, at 50.

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[2]/ At this point in the opinion the Supreme Court inserts Footnote 28 which 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).

Thus, the Supreme Court cited Sec. 215.26, Fla. Stat., as an example of a "relatively short statutes of limitations applicable to such actions."

[3]/ Amicus cite to the concurring opinion of J. Musgrave in United States Shoe Corp. v. United States, 907 F.Supp. 408 (Ct. of Intl. Trade 1995). However, Amicus do not provide the basis of J. Musgrave's concerns. J. Musgrave was upset that the majority had followed the two-year statute of limitations, set forth in the United States Code, in providing a refund of the unconstitutional tax. He would have found no time limit, but the majority followed the statutory time limitation. In discussing the fact that the Supreme Court had approved of "procedural obstacles" that could bar a refund, J. Musgrave stated "[i]n this vein the [Supreme] Court has indicated that states may enforce "relatively short statutes of limitation applicable to such actions." McKesson, 496 U.S. at 45, 110 S.Ct. at 2254 (citing Florida's three-year statute of limitations for tax refund suits)." 907 F. Supp., at 425. Therefore, the majority opinion supports a statute of limitations in a tax refund case, for a concurring opinion has no binding effect as precedence and does not constitute the law of the case. See, Lendsay v. Cotton, 123 So. 2d 745, 746 (Fla. 3d DCA 1960).

[4]/ The reason the Supreme Court had no sympathy with Florida's argument was stated succinctly, "Florida's failure to avail itself of certain of these methods of self-protection weakens any "equitable" justification for avoiding its constitutional obligation to provide relief." McKesson, 496 U.S., at 46. Therefore, if a procedural protection had been available and the taxpayer failed to comply with it, Florida would be protected.

Of course, Respondents do not discuss these parts of the McKesson opinion and their implications on the Respondents' argument. Nor do the Respondents discuss this point beyond the McKesson decision where the Supreme Court further clarified and emphasized the point that state procedural statutes may bar a taxpayer's refund case.

Even though McKesson resolved the question of the future validity of a state procedural statute, we can look to further Supreme Court cases for additional support that procedural statutes are still valid. James B. Beam Distilling Company v. Georgia, 501 U.S. 529, 111 S.Ct. 2439 (1991) (Jim Beam), Harper v. Virginia Department of Taxation, 509 U.S. 86, 113 S.Ct. 2510 (1993) (Harper), and Fulton Corporation v. Faulkner, __ U.S. __, 116 S.Ct. 848 (1996), address the continued validity of state "procedural" statutes and their effect on the "remedy" states may provide for invalid taxes.

The issue was truly brought into focus in James Beam. The primary issue in James Beam concerned whether the rule of law decided in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984), was to be applied retroactively not only to the parties in Bacchus but also to others, like Jim Beam, who were challenging the same sort of taxing statutes in other states. The Supreme Court held that where a "rule of law" was decided, the "rule of law" was to be applied retroactively in later cases. James Beam, 501 U.S., at 532 and 532-536, 111 S.Ct., at 2441 and 2442-2443.

The Supreme Court then discussed the difference between a "choice of law" and a "remedy." While a "choice of law" is to be applied retroactively, there sometimes is a problem when retroactivity is applied to a "remedy." As that Court stated:

> It is only when the law changes in some respect that an assertion of nonretroactivity may be entertained, the paradigm case arising when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct. Since the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law, "a choice ... between the principle of forward operation and that of relation backward." Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932). Once a rule is found to apply "backward," there may then be a further issue of remedies, i.e., whether the party prevailing under a new rule should obtain the same relief that would have been

> awarded if the rule had been an old one. Subject to possible constitutional thresholds, see McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court. See American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 210, 110 S.Ct. 2323, 2348, 110 L.Ed.2d 148 (1990) (STEVENS, J., dissenting).

James Beam, 501 U.S., at 534-535, 111 S.Ct., at 1143. However, in making its ruling on the "choice of law" question in that case, the Supreme Court stated:

> [t]he grounds for our decision today are **narrow**. They are confined entirely to an issue of **choice of law**: when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others **not barred by procedural requirements or res judicata**.

Id., 501 U.S., at 544, 111 S.Ct. at 2448 (e.s.). By such a statement, the United States Supreme Court made it clear that refunds and constitutional claims can be barred by a state's procedural requirements or the fact that the taxpayer has already litigated the matter prior to the invalidity of the tax and is now barred by res judicata. That reasoning would be consistent with the Court's earlier holding that "[a] constitutional claim can become time-barred just as any other claim can. . . . Nothing in the Constitution requires otherwise." Block v. North Dakota, 461 U.S. 273, 292, 103 S.Ct. 1811, 1822 (1983).

The Supreme Court then went on to state that it was not addressing the question of a remedy. That issue arose because Georgia had complained that it would be denied the right to use procedural statutes if the Supreme Court reversed the lower decision. The Supreme Court disagreed. Important for the issue before this Court is the language of the United States Supreme Court on page 2448 of the decision which said:

> Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by [Jim Beam] to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or **their consideration obviated by**, issues of state law." Bacchus, 468 U.S., at 277, 104 S.Ct., at 3058. Nothing we state here deprives [Georgia] of [its] 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 with which *McKesson* did not deal.** (e.s.)

Thus, in a "retroactive" question as to the rule of law, one turns to federal law. Ashland Oil, Inc.

v. Caryl, 497 U.S. 916, 918, 110 S.Ct. 3202, 3203 (1990) (*per curiam*). But in the question of the application of a procedural law or an appropriate remedy, one is governed by state law. Jim Beam, 501 U.S., at 535, 111 S.Ct., at 2443.; American Trucking Associations, Inc. v. Smith, 496 U.S. 167, 110 S.Ct. 2323 (1990).

Harper and Faulkner reaffirmed this position. In Harper, 113 S.Ct., at 2520, the Supreme Court noted that the question of remedy was for the Virginia courts to decide after stating "[w]e do not enter judgment for petitioners, however, because federal law does not necessarily entitle them to a refund." Id., at 2519. In Faulkner, the Supreme Court noted that the petitioners would need to go to the North Carolina courts for relief, but they may be procedurally barred.[5]/ Faulkner, 116 S.Ct., at 861-862.

Based on McKesson, James B. Beam, Harper and Faulkner, if a 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.

If there were any questions remaining after Beam, Harper, or Faulkner, the United States Supreme Court resolved the question of "independent" state law procedural statutes in the case of Reynoldsville Casket Co. v. Hyde, 514 U.S. 749, __, 115 S.Ct. 1745 (1995). In that case the Supreme Court discussed in detail the McKesson decision and the procedural statutes. Reynoldsville, 514 U.S., at ___, 115 S.Ct, at 1750. In its discussion, the Court stated:

> Suppose a State collects taxes under a taxing statute that this Court later holds unconstitutional. Taxpayers then sue for a refund of the unconstitutionally collected taxes. Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. But, what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity--a rule containing certain procedural requirements for any refund suit--nonetheless barred the taxpayers' refund suit? See *McKesson Corp., supra,* at 45, 110 S.Ct., at 2254; *Reich v. Collins,* 513 U.S. ----, ----, 115 S.Ct. 547, 550, 130 L.Ed.2d 454 (1994).

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[5]/ "As the question whether Fulton has properly complied with the procedural requirements of North Carolina's tax refund statute, § 105-267, ought to come before the state courts in the first instance. Cf. Swanson v. State, 335 N.C. 674, 680-681, 441 S.E.2d 537, 541 (noting that "[f]ailure to comply with the requirements in section 105-267 bars a taxpayer's action against the State for a refund of taxes"), cert. denied, 513 U.S. ----, 115 S.Ct. 662, 130 L.Ed.2d 598 (1994).

> Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim. *See McKesson Corp., supra,* at 45, 110 S.Ct., at 2254.

Reynoldsville, 115 S.Ct., at 1750.

The question arises is whether Florida possesses a "pre-existing, separate, independent rule of state law, having nothing to do with retroactivity--a rule containing certain procedural requirements for any refund suit?" The answer to that question is yes, twice! Both Sec. 72.011 and Sec. 215.26, Fla. Stat., are pre-existing, separate, independent rules of state law. Both have been in effect for a long time and both were enacted for reasons having nothing to do with retroactivity. Both are separate statutes, each addressing different sets of circumstances, that contain certain procedural requirements for any tax assessment challenge or tax refund suit. This Court well knows, both statutes have withstood constitutional challenges at the courts of appeal.[6]/ See, e.g., Department of Revenue v. Nu-Life Health and Fitness Center, 623 So. 2d 747 (Fla. 1st DCA 1992).

In Beam, the Supreme Court stated that a new rule of law had to apply "to all others **not barred by procedural requirements or res judicata**. Beam, 501 U.S., at 544, 111 S.Ct. at 2448.[7]/ That circumstance has already occurred in this State. As this Court should remember, Tampa Crown Distributors, Inc.'s, case against the State was consolidated with McKesson's in the Court's final order striking the illegal exemption and holding "prospective" relief only in

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[6]/ It is interesting to note that the Amicus have cited McCarthy v. Madigan, 503 U.S. 140 (1992). While noting that the Supreme Court concluded that the federal agency there could not resolve the issues, the Amicus forgot to inform this Court that the Supreme Court had a discussion of the difference between administrative exhaustion and legislative exhaustion. While administrative exhaustion will not be required in a constitutional question, "where Congress specifically mandates, exhaustion is required." (citations omitted). Id. 503 U.S., at 144. Thus, contrary to supporting the Amicus' position, McCarthy supports the Department's position because Sec. 72.011 and Sec. 215.26, Fla. Stat., are legislative mandates required to be followed.

[7]/ The circumstances happened to James Beam upon remand to the Georgia courts. After reviewing the facts and law, 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).

Division of Alcoholic Beverages v. McKesson, 524 So. 2d 1000 (Fla. 1988). Unlike McKesson, Tampa Crown chose not to appeal this Court's 1988 order. The Supreme Court, as stated above, reversed the refund question, stating a "rule of law" to be applied retroactively. Upon remand, Tampa Crown sought a refund of the taxes denied earlier by this Court. The State objected, and the First District Court of Appeal agreed, that Tampa Crown was barred by *res judicata,* irrespective of the McKesson decision by the U.S. Supreme Court, because Tampa Crown chose not to appeal this Court's adverse ruling on Tampa Crown's refund claim. Division of Alcoholic Beverages v. McKesson, 643 So. 2d 16, 20 (Fla. 1st DCA 1994), cert denied, ___ U.S. ___, 115 S.Ct. 1795 (1995). Consequently, even though McKesson called for a new "rule of law," Tampa Crown was denied a refund because its case became *res judicata* before McKesson applied to the case.

The First District Court of Appeals is not the only state court to have reviewed state procedural or *res judicata* effects on refund cases. The following are state court cases that have specifically addressed the effect McKesson on the denial of refund claims. St. Ledger v. Commonwealth, 942 S.W. 2d 893, 900-902 (Ky. 1997) [Constitutional challenge to intangible tax on corporate shares - two year statute of limitations not violative of McKesson, as statute is short period of limitations - refund claims dismissed; also, "filing of [tax refund suit] does not constitute the filing of an application for a refund for the purposes of the refund statute."]; American States Insurance Co. v. Michigan Department of Treasury, 220 Mich.App. 586, 590-91, 560 N.W.2d 644, 646-47 (1996) [Michigan 90 day filing requirement for a refund of alleged unconstitutional tax consistent with McKesson]; Estate of Bohn v. Scott, 185 Ariz. 284, 915 P.2d 1239 (App.1996) [Same argument as in this case - denying refund based upon state procedural statute would deny taxpayer of "clear and certain remedy." Argument rejected by the court finding no inconsistency with McKesson. 185 Ariz., at 292-93, 915 P.2d, at 1247-48.]. See also Jenkins by Agyei v. State of Missouri, 962 F.2d 762, 766 (8th Cir. 1992) [Missouri's protest and escrow procedures, Mo.Rev.Stat. § 139.031, not violative of McKesson].

Respondents have incorrectly stopped some 7 years short of the entire history of state

procedural laws. McKesson does **not** override valid, independent state procedural laws, such as Sec. 72.011 and Sec. 215.15, Fla. Stat.

B. OTHER STATE PROCEDURAL LAWS

Other states also have refund statutes. These state statutes likewise require the filing of refund claims prior to permitting a lawsuit to be filed. The following are a list of other state cases where the courts have **denied** refund claims where the taxpayer failed to follow the state's procedural statutes, irrespective of a retroactive "rule of law" or a constitutional claim. Stone v. Errecart, 675 A.2d 1322 (Vt. 1996) [32 Vt. Stat. Sec. 5884 - 3 year period to file a refund claim - filing mandatory]; Matteson v. Director of Revenue, 909 S.W.2d 356, 360 (Mo. 1995) [Sec. 143.801 and 143.821, Mo. Stat. - mandatory statutory prerequisites to receive a income tax 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) [Sec. 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) [Or. Revenue Stat. Sec. 305.765 - refund statute addressing only invalidated taxes]; Commonwealth of Kentucky v. Gossum, 887 S.W.2d 329, 334-335 (Ky. 1994) [Ky. Revenue Stat. Sec. 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); Swanson v. State, 335 N.C. 674, 441 S.E.2d 537 (1994) [8]/ ("[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."); Bailey v. State, 330 N.C. 227, 412 S.E.2d 295 (1991); Estate of Bohn, 174 Arz. 239, 245-46, 248, 250 and 251-52, 848 P.2d 324, 330-31, 333, 335 and 337-339. (App. 1992)[following refund statute, A.R.S. § 42-

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

124(B), mandatory, not optional even in unconstitutional claim]; Central Power & Light Co. v. Sharp, 919 S.W.2d 485, 491 (Tex.App. 1966) [constitutional challenge of tax - procedural requirements of tax refund statute are mandatory, jurisdictional prerequisite for court jurisdiction, exclusive waiver of Texas sovereign immunity]; Lee v. Tracy, 71 Ohio St.3rd 572, 645 N.E.2d 1242 (1995) [taxpayer failed to file refund claim within time allotted]; State v. Sproles, 672 N.E.2d 1353 (Ind. 1996) [Administrative protest and refund procedures mandatory even for constitutional challenges]. Accord Arkansas v. Staton, 325 Ark. 341, 942 S.W.2d 804 (1996).

C. EVEN CONGRESS AND THE SUPREME COURT RECOGNIZE PROCEDURAL REQUIREMENTS IN FEDERAL TAX CASES

Congress, like the various states, has enacted laws effecting refunds of monies paid to the United States Internal Revenue Service ("IRS"). 26 U.S.C. § 7422(a) requires a written claim for a refund and 26 U.S.C. § 6511 sets a time limit in which to file such a claim.

26 U.S.C. § 7422(a), requiring a written refund claim, 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 § 7422 federal case law is replete with cases holding that taxpayers are required to file a claim for refund with the Secretary of Treasury prior 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). Accord Commissioner of Internal Revenue v. Lundy, ___ U.S. ___, 116 S.Ct. 647, 650 (1996) The timely filing of a proper claim for refund is a jurisdictional prerequisite to a refund suit.[9]/ Lundy, ___ U.S., at ___, 116 S.Ct., at 651; United States v. Dalm, 494 U.S. 596, 601-02,

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[9]/ 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).

110 S.Ct. 1361, 1364-65 (1990).[10]/ The lack of a timely filed refund claim deprives the district court of subject matter jurisdiction. 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).

The time to file a refund claim is controlled by 26 U.S.C. § 6511, which 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 § 322(b)(1) [I.R.C.1939 (now 26 USCA § 6511)], prescribing the time for the making of claims for overpayments[11]/ of income taxes and for other taxes erroneously or illegally assessed or collected, was intended to be given its ordinary meaning."[12]/ Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947). Periods of non-claim limitations are "established to cut off rights, justifiable or not, that might otherwise be asserted, and such periods of limitation must be strictly

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[10]/ 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); Curasi v. U.S., 907 F.Supp. 373 (M.D. Fla.1995).

[11]/ "Hence we read the word 'overpayment' in its usual sense, as meaning any payment in excess of that which is properly due. Such an excess payment may be traced to an error in mathematics or in judgment or in interpretation of facts or law. And the error may be committed by the taxpayer or by the revenue agents. Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment." Jones, 332 U.S., at 531.

[12]/ "Section 322 and its predecessors were devised in order to provide such **an exclusive scheme**." Jones, 332 U.S., at 532. This is but an alternative to "exclusive procedure and remedy for refund claims" found in Sec. 215.26(4), Fla. Stat.

adhered to by the judiciary."[13]/ Kavanagh v. Noble, 322 U.S. 535, 539 (1947). The limitations period in 26 U.S.C. § 6511, governing tax refund claims, is jurisdictional in nature and cannot be waived.[14]/ 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). Untimely refund claims 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 (1990).

Very recently the United States Supreme Court decided a case concerning the timely filing requirements under the Internal Revenue Code. 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 circuits over the question of whether there existed an implied exception, called "equitable tolling," when the language of 26 U.S.C. § 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. § 6511 as "equitable tolling." The Supreme Court began its discussion by stating "§ 6511 sets forth its time limitations in unusually emphatic form." Brockamp, 117 S.Ct. 851. The Court noted that the limitations were set forth in "a 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,"[15]/ the U.S. 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

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[13]/ "And he had two years from the **date of that payment** within which to file a claim for refund. Since he did not file his claim until three and a half years after payment, the claim was **out of time**." Id., 322 U.S., at 538. (e.s.)

[14]/ This the same assertion the State makes as to Sec. 215.26, Fla. Stat.

[15]/ Victor Chemical, 74 So. 2d, at 562.

> limitations on the amount of recovery--a kind of tolling for which we have found no direct precedent. § 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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> * * *
>
> 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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> * * *
>
> 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.

In conclusion, like this Court long ago in Victor Chemical, the U.S. Supreme Court interprets the IRS Code to require a written refund claim within the time specified in the statute and such a refund claim is "jurisdictional," cannot be waived and is not tolled.

II. KUHNLEIN DID NOT ADDRESS THE ISSUE BEFORE THIS COURT NOR DID IT DISTINGUISH VICTOR CHEMICAL

Amicus adds the argument that State ex rel. Victor Chemical v. Gay, 74 So. 2d 560 (Fla. 1954) is no longer good law after McKesson. Petitioner's argument just set out above should put that argument to rest. As McKesson, Beam and Reynoldsville make clear, it is not just the fact that a tax is declared invalid, the taxpayer must still have to follow state procedural laws to receive his refund. In other words, taxpayers are not exempt from other requirements of law just because their cases involve invalid taxes.

Next is the assertion that this Court distinguished Victor Chemical in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). However, as this Court knows, and Amicus candidly admit (Brief, p.16), this Court never even mentioned Victor Chemical in the Kuhnlein decision. To argue that a case has been "distinguished" or even "overruled" without even mentioning the case is a stretch of argument. If this Court intends to distinguish or overrule an earlier decision of the Court, it would do so directly to obviate confusion among the practicing bar in future cases. This assertion holds no water.

Finally, Respondents and Amicus argue that this Court addressed the primary issues presented in this case in Kuhnlein. This is just not so. While this Court chose not to directly address either Sec. 215.26, Fla. Stat., and Victor Chemical in Kuhnlein[16/], Kuhnlein did not have before it the primary issues as framed in this case. This Court did not have to decide in Kuhnlein 1) whether there is a time limitation in which to file, claim or sue for a refund? or 2) McKesson's effect on state procedural statutes. These two questions have either not been heard before or for a very long time. For example, irrespective of whether a taxpayer needs to file a refund claim with an agency or may go directly to circuit court[17/], there remains the question of "is there a time limit in which the taxpayer *must take some action*?; is there an unlimited amount of time in which to seek a refund?; is Sec. 215.26, Fla. Stat., still a "statute of non-claim?" Because Kuhnlein was filed and decided before any time period on anyone had run, and the fact the McKesson issue presented here were not relevant in Kuhnlein, that case does not resolve the important issues presented by the Petitioner here.

[16/] Not directly addressing the "filing" requirement in Sec. 215.26(2), Fla. Stat., and Victor Chemical's upholding of that requirement, lead to a number of taxpayers to take cases directly to circuit courts without filing any refund claim with the appropriate agency under Sec. 215.26(2), Fla. Stat. See, Public Medical Assistance Trust Fund, et al., v. Hameroff, 22 Fla. Law Weekly D497d (Fla. 1st DCA February 18, 1997), pending review, Case No. 90,326, Florida Supreme Court.

[17/] A question Petitioner hopes this Court will also resolve so that both the State and taxpayers know the course of events in a refund situation, resolving any differences there may be between a "facial constitutional" challenge and other, more fact specific cases.

CONCLUSION

In summation, Respondents and the Amicus are barred from seeking or obtaining any refund. The United States Supreme Court recognizes that a refund claim could be barred by relatively short limitations laws applicable to such actions. See, McKesson, 496 U.S., at 54, n. 28, citing, Sec. 215.26, Fla. Stat. Even though a tax is a tax is held invalid, a taxpayer is not relieved of his statutory duty to follow any and all statutes that contain certain procedural requirements for any tax assessments or refund actions. Both the Respondents and Amicus have failed to follow Florida's pre-existing, separate, independent rules of state law, containing certain procedural requirements for any tax assessment or refund suit, Sec. 72.011(2) and Sec. 215.26, Fla. Stat. Because of that, McKesson and the other decisions of the United States Supreme Court do not give the Respondents and Amicus and comfort or relief from Florida procedural law; rather, they approve of these procedural safeguards to protect the public fisc of Florida.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Supplemental Reply Brief has been forwarded by U.S. Mail to FREDERICK D. HATEM, Esquire, 1549 SE Westmoreland Boulevard, Port St. Lucie, Florida 34952; STEPHEN J. BRONIS and SHARON L. KEGERREIS, Esquires, Miami Center, Suite 900, 201 South Biscayne Boulevard, Miami, Florida 33131; and G. RICHARD STRAFER and JOSE M. QUIÑON, Esquire, 2400 South Dixie Highway, Second Floor, Miami, Florida 33133 this 5th day of August, 1997.

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