OA 2-3-98

047

IN THE SUPREME COURT OF FLORIDA

PUBLIC MEDICAL ASSISTANCE TRUST FUND; et. al.,

Petitioners,

vs.

Case No. 90,326

NATHAN M. HAMEROFF, M.D., et. al., individually and on behalf of all others similarly situated,

Respondents.
_____/

On a Petition for Discretionary Review
Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv)

RESPONDENTS' ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

The Public Medical Assistance Trust Fund hospital tax was originally established in 1984 as an assessment on hospital revenues pursuant to Section 395.701, Florida Statutes (1983) and was utilized to partially fund the cost of indigent health care in the State of Florida. In 1991, the Florida Legislature expanded the Public Medical Assistance Trust Fund assessments beyond hospitals to include an assessment on certain defined "health care entities." §395.7015, Fla. Stat. (1995), (previously Section 395.1015) Ch. 91-112, Laws of Florida §177 (hereinafter the "PMATF statute"). The health care entities subject to the 1.5 percent PMATF assessment on net operating revenues (the "PMATF tax") under the PMATF statute are: 1) ambulatory surgical centers; 2) clinical laboratories; 3) freestanding radiation therapy centers; and, 4) freestanding diagnostic imaging centers. The Agency for Health Care Administration (hereinafter the "Agency" or "AHCA"), the entity charged with responsibility to administer and enforce the PMATF statute, has deemed certain physician group practices, including the Hameroff class representatives and class members, to be freestanding diagnostic imaging centers for purposes of the PMATF tax.

The PMATF statute includes no provision for fines or penalties related to non-reporting or non-payment, yet provides that AHCA may use its authority under Chapter 408 to administer the Section. §395.7015(5), Fla. Stat. (1995). The Agency has threatened Respondent class representatives and/or class members with the imposition of administrative fines and penalties of up to $1,000 per day for reporting and/or payment deficiencies related to the PMATF tax under Rule 59B-6.023 and 59B-6.024, Florida Administrative Code.

The trial court, in its Order Granting Respondents' Motion for Class Certification (Petitioners' Appendix at IX), made the following findings of fact, among others:

(1) The Plaintiffs have alleged that the PMATF statute is facially unconstitutional, violates several state and federal constitutional provisions and should be declared unconstitutional with full refunds ordered to all those who have paid the assessment and any penalties or fines (Order at ¶1);

(2) In their answer, Defendants, PMATF and the Agency for Health Care Administration ("AHCA") admitted that the PMATF assessment is a tax but contend that Plaintiffs have failed to fulfill the legislative condition precedent of seeking a tax refund pursuant to Section 215.26, and Defendants have also raised the defenses that the Circuit Court lacks jurisdiction under Section 26.012(2)(e) because this is not a suit involving a "denial of a refund" (Second Defense), and that Plaintiffs have no standing to challenge the PMATF statute in a representative capacity since they have not all previously paid the tax or any penalties (Fourth Defense) (Order at ¶2);

(3) The proposed class -- and that which was actually certified by the trial court -- consists of "all physicians and physician-owned medical practices which have, through AHCA's interpretation, administration and enforcement of the PMATF statute, been deemed to be free-standing diagnostic imaging centers under Section 395.7015(2)(b)4, Florida Statutes, and liable for reporting and payment of the 1.5% assessment and any penalties due under the statute" (Order at ¶3);

In its Order, the trial court made specific findings as to the circumstances applicable to each of the four class representatives as follows:

(1) Plaintiff Class Representative Nathan M. Hameroff, M.D., Gateway Radiology Consultants, P.A. ("Gateway"), is a physician group practice specializing in the field of radiology. Gateway fulfilled the PMATF

reporting requirements for the applicable period in 1992 and paid to AHCA's predecessor Healthcare Cost Containment Board, the sum of $835.68. Gateway has complied with one subsequent reporting requirement but has not paid any further assessments and has not filed a refund request;

(2) Plaintiff Class Representative Bay Area Heart Center, P.A. ("Bay Area Heart"), is a physician-based group practice of cardiologists. Bay Area Heart was assessed a $10,250 administrative fine for failure to report and pay the applicable tax for the 1994 reporting period. Thereafter, on or about October 6, 1995, Bay Area Heart complied with the reporting requirement and made payment, under protest, in the amount of $1,475. Bay Area Heart made a subsequent refund request pursuant to Section 215.26 on or about April 18, 1996;

(3) Plaintiff Class Representative Cardiology Specialists, P.A. ("Cardiology Specialists"), is a physician group practice specializing in the field of cardiology. Cardiology Specialists was assessed a $10,250 administrative fine for failure to report or pay any assessments allegedly owed in connection with the 1994 reporting period. Cardiology Specialists has not since complied with any reporting or payment requirements allegedly owed;

(4) Plaintiff Class Representative Cardiovascular Associates, Inc. ("Cardiovascular Associates"), is a physician-based group practice specializing in the field of cardiology. Cardiovascular Associates is virtually identical to the other two cardiology practices, although AHCA has not previously provided any violation notices to Cardiovascular Associates for non-payment or non-reporting. Cardiovascular Associates has not reported, has not paid and has not been assessed any penalties whatsoever.

The trial court concluded that the prerequisites to class representation contained in Florida Rule of Civil Procedure 1.220(a) were satisfied and found specifically that the

members of the class were so numerous that separate joinder of each member was impracticable (Order at ¶7); that the claims of the representative parties raised questions of law and fact common to the questions of law and fact raised by the claims of each member of the class (Order at ¶8); that the Plaintiff class representatives' claims were typical of the claims of each member of the class and that the Defendants had engaged in a common course of conduct against the class with Plaintiffs seeking the only available remedy on behalf of the class (Order at ¶9); and, that the named Plaintiffs will fairly and adequately protect and represent the interests of each member of the class and have obtained counsel competent and experienced in complex class action litigation (Order at ¶10);

The trial court also found in the alternative, pursuant to Florida Rule of Civil Procedure 1.220(b)(3), that the questions of law and fact common to the claims of the Plaintiffs and the claims of each member of the class predominate over any questions of law or fact which may affect individual class members, and that class representation is superior to any other available methods for the fair and efficient adjudication of this controversy (Order at ¶12).

SUMMARY OF ARGUMENT

In Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994), *cert. denied*, 115 S.Ct. 2608 (1995), this Court previously considered and rejected the very same arguments presented by the Petitioners herein. Sovereign immunity, in the guise of Florida's refund statute, cannot be used as a bar to certifying a class action when protesting taxpayers assert the facial unconstitutionality of a state taxing statute. The First District Court of Appeal followed Kuhnlein in affirming the trial court's certification of this action challenging Florida's Public Medical Assistance Trust Fund taxing statute as unconstitutional on its face for violating the guarantees of equal protection and due process of law.

Despite Petitioners' arguments, strict compliance with the refund statute (Section 215.26) is not a legislatively-imposed condition precedent to a refund suit. The language of the refund statute and case law interpreting same have shown it to be a non-jurisdictional administrative remedy. The concept of exhaustion of administrative remedies is a court-created doctrine. Accordingly, judicial discretion may be utilized in disregarding administrative remedies especially where, as herein, resort to an administrative proceeding would be futile because hearing officers have no power to declare a statute unconstitutional.

After the U.S. Supreme Court's decision in McKesson Corporation v. Division of Alcoholic Beverages, 496 U.S. 18, 110 S.Ct. 2238 (1990), and this Court's Kuhnlein decision, Victor Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954) is no longer reliable authority. Despite the significant changes in the law, Petitioners still urge reliance on Victor Chemical to support their arguments that Section 215.26 is a jurisdictional statute of non-

claim requiring the filing of a refund application prior to suit and within three years of the date the tax was paid. The refund statute states that the application should be filed with the Comptroller "within 3 years after the right to the refund has accrued." Nonetheless, Petitioners and Victor Chemical interpret "accrual" as the date the tax was paid, not when the taxpayer learned of a right to a refund.

Petitioners' interpretation of the refund statute, purportedly based upon Victor Chemical, is contrary to the type of clear and certain remedies required by McKesson to be made available to protesting taxpayers in order to ensure that they have a meaningful opportunity to contest the tax and obtain a refund. The operation of Florida's refund statute, as urged by Petitioners under Victor Chemical, would violate the procedural safeguards of due process.

Finally, because of the absence of a clear expression of legislative intent that Section 215.26(2) be read as a jurisdictional statute of non-claim, due process requires that it be construed as a statute of limitations. Under Petitioners' interpretation that Section 215.26 is a statute of non-claim, the Respondents will be prevented from recovering refunds of PMATF taxes paid if the PMATF statute is ultimately found unconstitutional because they did not all file pre-suit refund requests within three years from the date of payment. This interpretation is contrary to all notions of fairness and denies the type of "meaningful backward-looking relief" now required under McKesson, such that Victor Chemical must be overruled.

ARGUMENT

This Court has previously rejected Petitioners' identical arguments that protesting taxpayers must file pre-suit refund requests before the trial court's jurisdiction could be invoked. Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994), *cert. denied*, 115 S.Ct. 2608 (1995). This Court has also laid to rest any misconceptions about the role of sovereign immunity when considering the need to protect a taxpayer's rights in the face of an unconstitutional taxing statute:

> Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the state's will. Moreover, neither the common law nor a state statute can supersede a provision of the federal or state constitutions.

646 So.2d at 721.

In the present case, both the trial court and the First District Court of Appeal properly followed the directives of Kuhnlein in certifying Respondents' challenge to Florida's PMATF taxing statute as a class action. Respondents attack the facial constitutionality of the PMATF statute as a violation of several state and federal constitutional provisions, including denial of equal protection and due process of law. *Petitioners' Appendix at X (Class Certification Order) and I (Class Representation Complaint).* Under these facts, the First District properly applied "the clear holding in Kuhnlein that fulfilling the State's refund procedures is not a condition precedent to bringing a **constitutionally-based refund action**." Public Medical Assistance Trust Fund v. Hameroff, 689 So.2d 358, 359 (Fla. 1st DCA 1997) (emphasis added).

The First District, in Hameroff, had little difficulty adhering to the principles of Kuhnlein. However, based upon the questions recently certified by the Third[1] (cases which do not appear to raise constitutional concerns) and Fourth[2] District Courts of Appeal, it appears that Victor Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954) continues to create questions concerning the applicability and scope of Florida's refund statute.

Respondents urge that the Kuhnlein--Hameroff--Nemeth line of decisions are correct in properly creating an exception to the pre-suit refund application requirement for constitutionally-based challenges to taxing statutes because the Florida Legislature has never evidenced a clear intent in Section 215.26 that exhaustion of administrative remedies is mandatory or that compliance with the refund statute is jurisdictional. Therefore, judicial discretion may be exercised in permitting exceptions to strict compliance

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[1] Westring v. Department of Revenue, 682 So.2d 171 (Fla. 3d DCA 1996), *rev. denied*, 686 So.2d 583 (Fla. 1996) (class action challenging definition of "consideration" in connection with documentary stamp tax on post-dissolution of marriage transfers of real property); Department of Revenue v. Bauta, 691 So.2d 1173 (Fla. 3d DCA 1997) (same challenge as Westring), *rev. pending*, Case No. 91,081; Miami Tiresoles, Inc. v. Department of Revenue, 695 So.2d 851, *rev. pending* (non-constitutional challenge to validity of waste tire fee, certified conflict with Nemeth v. Department of Revenue, 686 so.2d 778 (Fla. 4th DCA 1997) and PMATF v. Hameroff, *supra*, while certifying as a question of great public importance whether Kuhnlein overruled or receded from Victor Chemical.

[2] Nemeth v. Department of Revenue, 686 So.2d 778 (Fla. 4th DCA 1997), *rev. pending*, Case No. 89,909 (uphold class action challenging the facial constitutionality and seeking refunds under an earlier version of Florida's vehicle impact fee but certified as a question of great public importance whether Kuhnlein overruled or receded from Victor Chemical "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." 686 So.2d at 780 (compare with the broader question certified in Miami Tiresoles, *supra*, note 1).)

particularly where, as here, the PMATF statute is alleged to be unconstitutional on its face and an administrative hearing officer is powerless to make any such finding.

With regard to the applicable limitation period for bringing a refund action -- an issue not specifically addressed in Kuhnlein -- it is respectfully suggested that Section 215.26(2) is properly viewed as a statute of limitation since due process requires nothing less. The accrual of a cause of action for a refund should not commence until such time as the taxpayer is aware of such a right, which is consistent with the requirements of the U. S. Supreme Court's decision in McKesson Corporation v. Division of Alcoholic Beverages, 496 U.S. 18, 110 S.Ct. 2238 (1990).

I. COMPLIANCE WITH SECTION 215.26 IS NOT A CONDITION PRECEDENT IN THIS CONSTITUTIONALLY-BASED REFUND ACTION.

Petitioners' have urged strict compliance with Florida's refund statute as a legislatively-imposed jurisdictional condition precedent to any suit seeking a tax refund. Petitioners also argue that Section 215.26 is a statute of non-claim and that the failure to timely file an application for a refund divests the circuit court of jurisdiction. Petitioners continue to assert this position despite this Court's recent holding in Kuhnlein creating an exception to compliance with Section 215.26 for constitutionally-based refund actions. To the extent that the claims of the Hameroff class representatives or class members were made without a prior refund application or more than three years since the date of first payment, Petitioners argue that such claims are now barred.

Such an interpretation, however, files in the face of the legislative intent behind Florida's refund statute which is to serve as an available administrative remedy for refunding taxes paid improperly, thereby potentially avoiding the necessity of litigation. Reynold's Fasteners, Inc. v. Wright, 197 So.2d 295 (Fla. 1967).

A. Florida's Refund Statute is Not Jurisdictional, But an Administrative Remedy Subject to Judicial Discretion.

Section 215.26 contains no indication that it is intended to be jurisdictional. Similarly, the PMATF statute makes no provision whatsoever for challenging the validity of the assessment or seeking a refund of any assessments paid. Further, Florida's refund statute does not reference or include the PMATF tax.

Additionally, Section 72.011, a statute specifically authorizing alternative remedies for protesting taxpayers of either filing an administrative complaint or filing an action in the circuit court to contest the denial of a refund, does not include PMATF taxes. §72.011(1)(a), Fla. Stat. (1995). The remedies described in Section 72.011 are limited to the particular taxes listed. A protesting PMATF taxpayer is left to wade through a maze of complex statutory provisions (none of which expressly include the PMATF tax) to determine how to challenge the assessment and seek refunds.[3] Florida's refund statute

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[3] It is significant to note that Respondent/Class Representative Bay Area Heart Center, P.A., through counsel, advised Petitioner Agency for Health Care Administration that it would be submitting the challenged assessments "under protest" because it was wrongfully classified as a diagnostic imaging center and advised AHCA that:

> We are unable to locate any statutory or regulatory procedures for filing the PMATF assessments under protest or seeking refunds for wrongfully collected assessments. Thus, we are providing the Agency with notice of

has been implicated in this case solely through Petitioners' defenses raised in the trial court below.

Other than the certified cases pending before this Court (*supra* notes 1 and 2), there have only been three significant instances when this Court has been called upon to interpret and/or apply Florida's refund statute. At the second such instance (the first being Victor Chemical and the third being Kuhnlein) in Reynold's Fasteners v. Wright, *supra*, this Court accepted jurisdiction based upon conflict between the Third and Fourth District Courts of Appeal concerning the appropriate limitation to apply in suits seeking recovery of personal property taxes paid under protest. All parties agreed that the personal property was immune from taxation under the import/export clause of the U.S. Constitution. One of the issues was whether the taxpayers were required to first seek a refund before instituting suit.

The Reynolds' court was faced with several different refund statutes, including Section 215.26. This Court concluded that a pre-suit refund request was required but described compliance with the refund statutes as an administrative remedy. This Court

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(3 Cont'd.)

> protest via this letter. If the Agency requires alternative procedures, please promptly advise of them so that we may comply.

None of the Petitioners, including AHCA, has ever responded in any manner to Bay Area's request for information on filing under protest or seeking a refund. After the issue was raised in litigation, Bay Area Heart filed its refund application on or about April 18, 1996 pursuant to Section 215.26, without waiver of its rights to contest the applicability of the refund statute. To date there has been no response whatsoever to Bay Area Heart's refund application. *Petitioners' Appendix at VIII (Memorandum of Law in Support of Motion for Class Certification at 5-6).*

held that refund statutes generally, including 215.26, were created as a means for the protesting taxpayer to attempt to resolve their refund request through administrative remedies:

> There are a number of these refund statutes applying to various tax payments and other refund claims . . . This focuses attention on the necessity to comply with the provisions of these statutory provisions as *exhausting administrative remedies.*
>
> . . .
>
> 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.*

197 So.2d at 297 (emphasis added); *see* also, Florida Livestock Board v. High Grade Food Products Corp., 145 So.2d 535, 537 (Fla. 1st DCA 1962) (the First District held specifically that Section 215.26 "is intended to provide an *administrative procedure* by which a person may secure a refund of monies paid by him into the treasury of this state, if such payment was made under any of the conditions specified in the statute.") (emphasis added).

Neither the First District in Florida Livestock Board, nor this Court in Reynold's Fasteners, found compliance with the refund statute to be jurisdictional. Nor did either court describe compliance as a necessary legislative condition precedent to bringing suit. This is significant because the doctrine requiring exhaustion of administrative remedies is not jurisdictional. It is a court-created prudential doctrine, a matter of policy, not power. Gulf Pines Memorial Park v. Oakland Memorial Park, 361 So.2d 695 (Fla. 1978). Compliance with Florida's refund statute should properly be viewed as an administrative remedy which, as a doctrine of court-created deference, may be disregarded in appropriate

circumstances. Department of Revenue v. Brock, 576 So.2d 848, 850 (Fla. 1st DCA) *rev. denied*, 584 So.2d 997 (Fla. 1991). As demonstrated hereinbelow, the facts of our case are an appropriate circumstance to disregard the refund statute because an administrative hearing officer is powerless to declare a statute facially unconstitutional.

The exhaustion doctrine assures that an agency responsible for implementing a statutory scheme has a full opportunity to reach a sensitive, mature and complete decision upon a fully developed record. Key Haven Associated Enterprises, Inc. v,. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153, 158 (Fla. 1982). Typically, exhaustion is required because an administrative remedy is contemplated as being adequate. Gulf Pines, 361 So.2d at 699. And, if resolved within the context of an administrative proceeding, the necessity of litigation is avoided. Reynold's Fasteners, *supra*.

Unless specifically mandated by the legislature, however, exhaustion is not required and sound judicial discretion governs. McCarthy v. Madigan, 503 U.S. 140, 144, 112 S.Ct. 1081, 1086 (1992); McGee v. United States, 402 U.S. 479, 483, n. 6, 91 S.Ct. 1565, n. 6 (1971) ("where Congress has not *clearly required* exhaustion, sound judicial discretion governs") (emphasis added). A specific mandate by the legislature is based either upon express statutory directives or gleaned from legislative intent. McCarthy, 503 U.S. at 144. Neither the language of the refund statute nor its legislative intent supports a conclusion that exhaustion is required.

This Court's analysis in Reynold's Fasteners did not conclude that the legislature required exhaustion under the refund statute. Similarly, a review of the language of

Section 215.26 fails to demonstrate any specific legislative mandate that the statute is intended to be the exclusive procedure or remedy available to protesting taxpayers seeking a refund. Petitioners' argue that an administrative mandate was expressly written into the refund statute (Initial Brief at 13), and that Section 215.26(4) demonstrates a legislative intent that the refund statute is the exclusive remedy and procedure by which an aggrieved taxpayer may obtain a refund from the state (Initial Brief at 9). These arguments are simply unsupportable and less than accurate.

Petitioners' rely on the language of Section 215.26(4) (added by amendment in 1983) to support their argument of "exclusive procedure and remedy" for taxpayer refunds:

> This section is the exclusive procedure and remedy for refund claims between ***individual funds*** and accounts in the state treasury.

§215.26(4), Fla. Stat. (1995) (emphasis added); §28, Laws of Florida 1983, Ch. 83-339. A plain reading of the excerpted section makes clear, however, that the exclusivity reference to individual funds means trust funds, not individual citizens seeking tax refunds. This interpretation is further bolstered by the Senate Staff Analysis and Economic Impact Statement prepared June 15, 1983 for this legislation (Senate Bill 4-B):

> Section 215.26, Florida Statutes, is amended to provide that the procedure provided for the refund of monies paid into the state treasury in error, ***from interfund transfers***, be the exclusive procedure and remedy available to individual funds and accounts in the state treasury.

Finally, the jurisdiction of the courts in tax matters is considered paramount. The Florida Constitution contemplates relief after payment of illegal taxes through a court action, not administratively. Art. VII, §13, Fla. Const. ("Until payment of all taxes which

may have been legally assessed upon the property of the same owner, **no court** shall grant relief from the payment of any tax that may be illegal or illegally assessed" - emphasis added). Additionally, the circuit courts have exclusive original jurisdiction "in all cases involving legality of any tax assessment or . . . denial of refund except as provided in s.72.011." §26.012(2)(e), Fla. Stat. (1995). Therefore, when considering the provisions of the Florida Constitution, Section 26.012(2)(e), and Section 215.26, it does not appear that the legislature ever intended Section 215.26 as a jurisdictional condition precedent to the initiation of an action for a tax refund.

While Petitioners have cited many reasons why the Respondents should first pursue their refund claims administratively through the Comptroller and/or AHCA pursuant to Section 215.26 (Initial Brief at 13-15)[4], none of the reasons can realistically include a refund of the PMATF taxes paid because the PMATF statute is being challenged as facially unconstitutional. Quite simply, ours is one of the situations where exhaustion of administrative remedies is not only unavailing but futile, a useless act and a complete waste of time since administrative hearing officers lack jurisdiction to consider constitutional issues. Department of Revenue v. Young American Builders, 330 So.2d 864 (Fla. 1st DCA 1976). Under these circumstances, when administrative proceedings can

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[4] Another purported reason cited by Petitioners in support of exhaustion is that if the refund request is denied by AHCA, Respondents have 60 days to seek review of the denial in circuit court under Section 72.011(1)(a) (Initial Brief at 15). This argument is absolutely wrong. The PMATF statute is not one of the specifically enumerated taxes described in sub-section (1)(a). *See, supra* at 10. Therefore, the Respondents may not avail themselves of the remedy of a circuit court filing or an administrative proceeding under Chapter 120 for a refund denial by AHCA or the Comptroller.

have no effect on the constitutional issue to be presented in the circuit court, this Court has held that:

> It is pointless to require applicants to endure the time and expense of full administrative proceedings to demonstrate "need" before obtaining a judicial determination as to the validity of that statutory prerequisite.

Gulf Pines, 361 So.2d at 699. Therefore, despite a preference for restraining judicial intervention into the decision-making function of the executive branch, a challenge to the facial constitutionality of a statute is one area where judicial intervention without administrative exhaustion is authorized. Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 427 So.2d 153, 157 (Fla. 1982).

B. *Victor Chemical* is of Questionable Authority After *McKesson* and Should be Overruled.

Florida's refund statute has undergone very little change since its initial inception in 1943. Currently, as it has for the last forty-five years, Section 215.26 provides that the Comptroller may refund amounts paid into the state treasury which represented: (a) an overpayment, (b) a payment where no tax was due, or (c) a payment made in error. §215.26(1), Fla. Stat. (1995). The statute provides that applications for refunds must be filed with the Comptroller "within 3 years after the right to the refund has accrued or else the right is barred." §215.26(2), Fla. Stat. (1995). The *sine qua non* for Petitioners' interpretation of the refund statute as a jurisdictional statute of non-claim is this Court's 1954 decision in Victor Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954).

With the passage of time, significant changes in the law in this area have occurred. After the U.S. Supreme Court's decision in McKesson Corporation v. Division of Alcoholic

Beverages, 496 U.S. 18, 110 S.Ct. 2238 (1990) and this Court's decision in Department of Revenue v. Kuhnlein, *supra*, Victor Chemical is of questionable authority. Despite changes in the law, however, Petitioners continue to cling to Victor Chemical in urging that the refund statute is a statute of non-claim and the accrual for filing a refund application is measured from the date the taxes were paid. Even beyond the changes in the law, Victor Chemical was never as compelling or instructive as Petitioners have claimed.

First, the Victor Chemical court never found that compliance with the refund statute was jurisdictional. Section 215.26 has never included the express language that compliance with the requirements of the statute were jurisdictional.[5] In the absence of a "clear expression of legislative intent," a statute cannot be considered a jurisdictional statute of non-claim. Markham v. Neptune Hollywood Beach Club, 527 So.2d 814, 816 (Fla. 1988) (§194.171(6) contains "clear expression of legislative intent" to be considered a jurisdictional statute of non-claim).

Secondly, the Victor Chemical Court analogized tax refund considerations to the need for speedy and final determinations under estate and probate law. The court

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[5] Compare this with Section 72.011(5) which states specifically that: "The requirements of this section are jurisdictional", and Section 194.171(6), Fla. Stat., which provides that the requirements of commencing an action to contest a tax assessment within 60 days from the date the assessment is certified for collection is jurisdictional:

> The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met. A court shall lose jurisdiction of a case when the taxpayer has failed to comply with the requirements of subsection (5).

§194.171(6), Fla. Stat. (1995).

described the refund statute as an "administrative statute of limitations" constituting part of the "procedure of the court" for the orderly, expeditious and exact settlement of claims. 74 So.2d at 562-63. Victor Chemical never discussed the real significance of the distinction between statutes of limitation which are subject to defenses, and a statute of non-claim which prevents the claim from ever being brought because it is extinguished, thereby divesting a court of jurisdiction. *See*, Markham, 527 So.2d 815-16. Instead, the Victor Chemical court, in rather equivocal language, stated that: "F.S. Section 215.26, F.S.A., is not strictly speaking, a statute of limitations but is more *in the nature of* a statute of non-claim." 74 So.2d at 562 (emphasis added). Certainly, in describing the refund statute as an "administrative statute of limitations" and part of the "procedure of the court," the Victor Chemical court seemed to be defining Section 215.26 as an administrative remedy subject to judicial discretion.

Next, the origin of the oft-cited passage in Victor Chemical that "the recovery of illegally exacted taxes is solely a matter of governmental grace," was made within the context of the outmoded distinction between taxes paid voluntarily or involuntarily:

> In the absence of an authoritative statute, taxes voluntarily, although erroneously, paid cannot be voluntarily refunded, although there may be justice in the claim. . .

74 So.2d at 562 (emphasis added). Formerly, there was no remedy for the refund of taxes paid voluntarily. North Miami v. Seaway Corp., 9 So.2d 705 (Fla. 1942). Relief was restricted to cases in which the tax was illegal or void and paid involuntarily or under duress. Brickell v. City of Miami, 103 So.2d 206 (Fla. 3d DCA 1958).

Additionally, when Victor Chemical was decided, taxpayers were required to file a protest at the time the contested tax was paid or else the taxpayer would not be entitled to subsequently seek a refund. North Miami v. Seaway Corporation, *supra*. (This might explain why the Victor Chemical majority did not believe it too onerous to measure "accrual" from the date of payment instead of from when the taxpayer became aware of a right to a refund.) And, prior to 1963, the Comptroller had complete authority to administer the various tax statutes, including approving refunds, although this authority was later limited upon creation of the State Revenue Commission in 1963. Florida Expert Tobacco Co., Inc. v. Department of Revenue, 510 So.2d 936, 944 (Fla. 1st DCA 1987).

Finally, the language relied upon by Petitioners as arguably making the statute jurisdictional ("the exclusive procedure and remedy for refund claims . . .") was not part of the refund statute considered by the Victor Chemical Court in 1954; it did not come into existence until 1983, some thirty years after Victor Chemical was decided. §215.26(4), Fla. Stat. (1995), *supra* at 14.

The Petitioners' efforts to overlook the questionable and unfair principles of Victor Chemical are understandable. Other than prevailing on the merits, the State's only means to prevent substantial refunds if the PMATF statute is declared unconstitutional, is through the arguments that a pre-suit refund request is jurisdictional and must be filed within three years of the date of payment. Of course, several members of the Respondent class have been paying the assessment for years and were not aware of a right to a refund. This is especially true since AHCA, until this action in the trial court, insisted that the PMATF "assessment" was not a tax for which a refund could be requested. For that matter, no

member of the class is presently aware of a right to a refund or that "no tax is due," §215.26(1)(b), because this issue has yet to be decided. Regardless of their feelings about the PMATF tax, though, all class members continue to pay it because of the potential of being assessed administrative fines and penalties of up to $1,000 per day for failure to report to AHCA and pay the amount assessed. Fla. Admin. Code Rules 59B-6.023-.024.

Nevertheless, the evolution of the law over the last 45 years has eliminated the justification for reliance on Victor Chemical. The decision and its questionable interpretation of Florida's refund statute is completely contrary to the requirements that taxpayers have a fair opportunity to challenge the accuracy and legal validity of their tax obligations. Available remedies must be clear and certain to ensure that the opportunity to contest the tax and obtain a refund is meaningful. McKesson Corporation v. Division of Alcoholic Beverages, 496 U.S. 18, 110 S.Ct. 2238 (1990).

In McKesson, a discriminatory liquor tax favoring in-state distributors with preferred rates was invalidated by the Florida trial court as unconstitutionally discriminating against interstate commerce. This Court affirmed the trial court's determination and upheld the trial court's order that preferential rate reductions would cease, while also upholding the trial court's refusal to order refunds. Prior to suit, McKesson pursued a refund application under Section 215.26 claiming the tax scheme was unlawful. The Comptroller disagreed and denied the refund application.

In response to this Court's refusal to provide refunds and only prospective relief, the McKesson Court held that:

> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

496 U.S. at 31, 110 S.Ct. at 2247. As the McKesson Court explained, exaction of a tax constitutes a deprivation of property, therefore the state must provide "procedural safeguards" against unlawful exactions in order to satisfy commands of the due process clause. 496 U.S. at 36, 110 S.Ct. at 2250.

In reviewing the various procedural safeguards employed in Florida, the Court concluded that Florida did not purport to provide taxpayers with a meaningful opportunity to withhold payment and obtain a pre-deprivation determination of the tax assessment's validity. Instead, the McKesson Court found that Florida requires taxpayers to raise their objections to the tax in a post-deprivation refund action. To satisfy due process, the post-deprivation refund action must provide taxpayers with:

> Not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy', O'Connor, 223 U.S. at 285, 32 S.Ct. at 217, for any erroneous or unlawful tax collection to ensure that the opportunity to contest the tax is a meaningful one.

496 U.S. at 39, 110 S.Ct. at 2251. The liquor tax was not invalidated in its entirety as the tax scheme was unconstitutional only insofar as it discriminated against interstate commerce. As such, Florida was held to have flexibility in correcting the discriminatory treatment through a variety of post-deprivation remedies such as partial refunds, assessing and collecting back taxes from McKesson's competitors, among other remedies.

The significance here is that any form of post-deprivation relief must be meaningful. In balancing the need not to undermine the state's ability to engage in sound fiscal planning, the McKesson Court provided examples of post-deprivation restrictions including statutory requirements that refunds would be available only to those taxpayers who pay under protest or who provide timely notice of a complaint, paying refunds on an installment basis, enforcing relatively short statutes of limitation, among others. 496 U.S. at 45, 110 S.Ct. at 2254-55.

However, in those situations where the tax is declared invalid because beyond the state's power to impose (i.e. unconstitutional), the McKesson Court held that:

> No corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to 'undo' the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to 'collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment.'

[citation omitted]. Id. at 496 U.S. at 39, 110 S.Ct. at 2251. If the PMATF tax is declared unconstitutional, a full refund would be required under McKesson since no corrective action by the state could cure the invalidity. Under these circumstances, due process would not permit the continued and self-serving Victor Chemical interpretation of the refund statute as a statute of non-claim, or measuring the limitation period from the date the tax was paid. In short, Victor Chemical appears dead after McKesson. The Victor Chemical approach, and that urged herein by Petitioners, cannot possibly be harmonized with the requirement of providing meaningful backward-looking relief.

With a full understanding and appreciation of McKesson, this Court, in Kuhnlein, rejected each and every one of the arguments previously raised by Petitioners that Section 215.26 could be used as a bar to a constitutionally-based challenge to a taxing statute:

> We also do not believe that there is any requirement that the plaintiff must pay the fee or request a refund, at least in the present case. The fact that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax is sufficient to create standing under Florida law.
>
> . . .
>
> The State next argues that the cause below was barred by the state's sovereign immunity by an alleged common law rule that no one is entitled to the refund of an illegal tax, and by the requirements of Florida's refund statues. Even if true, these are not proper reasons to bar a claim based on *constitutional* concerns.

646 So.2d at 720-21 (emphasis in original).

II. SECTION 215.26 IS A STATUTE OF LIMITATION, NOT A STATUTE OF NON-CLAIM; A REFUND CAUSE OF ACTION DOES NOT ACCRUE UNTIL THE TAXPAYER IS AWARE OF THE RIGHT TO A REFUND.

When this Court previously considered Section 215.26 in Reynold's Fasteners, it chose to disregard the limitation period contained in the statute in favor of the general statute of limitation act. It appears that one of the principal reasons for this Court's selection of the general limitation act was that Florida Statute Section 200.36, concerning refund of tangible personal property taxes, contained no express limitation period. Rather than adopting the one-year limitation period contained in the former Section 215.26, this Court chose the general three-year limitation set forth in Chapter 95. Based upon our facts

and the teachings of McKesson, this Court should view Section 215.26(2) as a statute of limitation.

Due to the confusion concerning the measuring period in Section 215.26(2) as interpreted in Victor Chemical, the Reynold's Court admonished the legislature to attempt to correct the vague and ambiguous provisions of Section 215.26:

> Because of the diversity of statutory provisions relative to relief in this field [i.e. tax refunds], it is commended to the Legislature for their consideration and recodification.

195 So.2d at 298. The Legislature never responded. This Court also, in Reynold's Fasteners, provided an instructive quotation from William Terrell Hodges regarding legislation in the area of taxation under Florida law:

> Even such a cursory excursion, however, unavoidably uncovers some apparent statutory inconsistencies and conflict among court decisions, and indicates even more enigmas left unresolved by the pertinent legislation.

195 So.2d at 298, note 5.

Similarly, in the first significant opinion by this Court in the area of tax refunds, it was stated that:

> Where the intent or meaning of tax statutes, or statutes levying taxes, is doubtful, they are, unless a contrary legislative intention appears, to be construed *most strongly against the government* and *in favor of the taxpayer or citizen.* Any doubts as to their meaning are to be resolved against the taxing authority and in favor of the taxpayer, or, as it is sometimes put, the person upon whom it is sought to impose the burden.

Tampa Electric Co. v. Gay, 40 So.2d 225, 299 (Fla. 1949) (emphasis added).

In the absence of a clear expression of legislative intent that Section 215.26(2) be read as a jurisdictional statute of non-claim, due process requires interpreting it as a statute of limitation. Miller v. Nolte, 453 So.2d 397, 401 (Fla. 1984). In Miller, this Court was concerned that a taxpayer should not lose his right to challenge an assessment on his real property even though he failed to file his complaint within 60 days from the date the assessment was certified for collection, as required in Section 194.171(2). Under this section, the county adjustment board was required to issue findings before the 60-day period had run. Since the taxpayer was not provided with the findings in a timely manner, the Miller Court held that his due process rights would be violated if the statute was deemed a non-claim statute since he would be unable to argue estoppel against the county's defense that he did not file timely. The Miller decision was based upon a prior version of Section 194.171(2) which lacked any clear intent that same be jurisdictional. The statute was later amended to provide that:

> The requirements of subsections (2), (3), and (5) are jurisdictional. No court shall have jurisdiction in such cases until after the requirements of both subsections (2) and (3) have been met.

§194.171(6), Fla. Stat. (1983). The addition of the above subsection by amendment in 1983 was sufficient to then characterize Section 194.171 as a statute of non-claim. Markham v. Neptune Hollywood Beach Club, 527 So.2d 815.

By comparison, the language of Section 215.26(2) ("Application for refunds . . . must be filed . . . within 3 years after the right to the refund has accrued or else the right is

barred") is no more an indication of a non-claim statute than the older version of Section 194.171(2) at issue in Miller which was held to be a statute of limitation:

> No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under s.193.122(2).

Miller v. Nolte, 453 So.2d at 399. Certainly, Section 215.26(2) must be viewed as a statute of limitation. To find otherwise would result in an unconstitutional denial of the Respondents' due process rights to recover amounts paid under an unconstitutional and void taxing statute.

In his dissenting opinion in Victor Chemical, Justice Hobson pointed out that measuring the "accrual" from date of payment was based upon a "bald statement" in Tampa Electric Co. v. Gay, 40 So.2d 225, 288 (Fla. 1949) which contained little reasoning or analysis. Justice Hobson also concluded that the right to the refund could not have accrued until the statute under which the taxes were paid was declared unconstitutional and thereby rendered inoperative. As he stated:

> It is my considered judgment that when a taxpayer assumes the role of a good, conscientious, law-abiding citizen pays a tax under a law which is presumptively valid and thereafter the court of last resort decides that it is unconstitutional, such taxpayer should not be held barred from securing the return of money so paid by application of a general statute of non-claim.

72 So.2d at 567. In criticizing the unfair result in Victor Chemical's majority opinion where the underlying tax was declared unconstitutional yet a refund denied, Justice Hobson also urged that:

> The state should encourage, rather than discourage, conduct which exemplifies good citizenship and should not be

> permitted to retain monies exacted under the guise of a presumptively valid tax law. Indeed, we have on more than one occasion observed when discussing the subject of fair dealing that the state should set the example.

Id.

In this regard, Justice Hobson felt that the legislative intent behind the language "after the right to such refund shall have accrued" was obvious and to be measured from the date the underlying statute was declared unconstitutional. As he pointed out, the legislature could have readily used the clear, unambiguous and direct phraseology of "within one year from the date upon which the tax is paid", yet refused to do so. 74 So.2d at 567 (emphasis added). Similarly, in all of the subsequent legislative sessions up to this date, no such clarification has been provided by the legislature.

Quite obviously, therefore, Section 215.26(2) must be viewed as a statute of limitation with accrual measured from the date the taxpayer becomes aware of a right to a refund. Any other interpretation would result in a violation of McKesson's directive that Florida provide meaningful backward-looking relief to rectify the unconstitutional deprivation experienced by Respondents. To the extent of this inconsistency, therefore, Victor Chemical must be overruled.

CONCLUSION

For all of the foregoing reasons, the Respondents respectfully request that this Court affirm the First District Court of Appeal's decision in Agency for Health Care Administration v. Hameroff as consistent with Kuhnlein and, to the extent necessary, overrule Victor Chemical Works v. Gay, and grant such other and further relief as this Court deems just and appropriate under the circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **CYNTHIA A. MIKOS, Esquire**, Holland & Knight LLP, 510 Vonderburg Road, Suite 3005, Brandon, FL 33511 and to **ERIC J. TAYLOR, Esquire**, Office of the Attorney General, State of Florida, The Capitol, Special Projects, Tallahassee, Florida 32399-1050, this 3rd day of December, 1997.

MURRAY B. SILVERSTEIN

IN THE SUPREME COURT OF FLORIDA

PUBLIC MEDICAL ASSISTANCE TRUST FUND; et. al.,

Petitioners,

vs. **Case No. 90,326**

NATHAN M. HAMEROFF, M.D., et. al., individually and on behalf of all others similarly situated,

Respondents.
_____/

On a Petition for Discretionary Review
Pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv)

APPENDIX TO RESPONDENTS' ANSWER BRIEF

---

1. Appellees' Response to Motion for Clarification/Rehearing and/or Rehearing *En Banc* dated March 14, 1997

2. Order Granting Plaintiffs' Motion to Approve Form of Notice of Class Action and Plaintiffs' Motion to Stay Enforcement, Collection, and Abate Accrual of Penalties During Pendency Litigation dated July 1, 1996

IN THE DISTRICT COURT OF APPEAL
THE STATE OF FLORIDA
FIRST DISTRICT

PUBLIC MEDICAL ASSISTANCE TRUST FUND; et. al.,

Appellants,

vs. Case No. 96-2172

NATHAN M. HAMEROFF, M.D.; et. al.,

Appellees.

APPELLEES' RESPONSE TO MOTION FOR CLARIFICATION/REHEARING AND/OR REHEARING *EN BANC*

The Appellees, NATHAN M. HAMEROFF, M.D., et al., by and through their undersigned attorneys hereby respond to Appellants' Motion for Clarification/Rehearing and/or Rehearing *En Banc*, and say as follows:

The foundational basis for Appellants' challenge must be re-emphasized since their Motion for Rehearing. Appellants initiated this interlocutory appeal from the trial court's non-final order of May 2, 1996 which granted class certification to this multi-count action attacking the constitutional validity of the statute creating Florida's Public Medical Assistance Trust Fund ("PMATF") (Section 395.7015) as applied to the class defined as physician-owned medical practices now liable for reporting and payment of a 1.5% assessment on net operating revenues in order to help fund the cost of indigent health care in the State of Florida.

Simply stated, Appellants have urged that the Appellee class representatives cannot demonstrate sufficient commonality for class certification since not all of the representatives and class members, prior to suit, applied for and were denied a refund of the assessments previously paid. As argued, Appellants have taken issue with the trial court's order for its failure to require Appellees to comply with Florida's refund statute as a "legislative condition precedent" to maintaining this action, either directly or in a class setting. It is clear that this court's opinion of February 18, 1997 affirming the trial court was based entirely upon the portion of the Florida Supreme Court's decision in Department of Revenue v. Kuhnlein, 646 So.2d 717 (Fla. 1994), which held that compliance with Florida's refund statute is not a legislative condition precedent to bringing this class action. Contrary to Appellant's arguments, this court did not create the exception to compliance with the refund statute. Instead, it is readily apparent that this court simply followed the exception already outlined by the Kuhnlein court.

There is nothing contained within Appellants' Motion for Clarification/Rehearing which raises any new issues or otherwise furnishes a basis for clarification, beyond what has previously been argued. As such, the Motion is without legal basis. As will be shown hereinbelow, Appellants now seek to inject an "additional issue" which this court supposedly failed to address, that being the "timeliness" issue. The fact that this court chose not to specifically address the issue in its recent opinion does not mean it was not considered. On this and all other grounds raised in the Motion, Appellants have failed to meet their burden of demonstrating "with particularity" the particular points of law or fact overlooked or misapprehended by this court, as opposed to merely rearguing the same points. Fla.R.App.P.

9.330(a); Elliott v. Elliott, 648 So.2d 135 (Fla. 4th DCA 1994); and, Seslow v. Seslow, 625 So.2d 1248 (Fla. 4th DCA 1993).

Clarification

As concerns the portion of Appellant's Motion seeking clarification in which it is urged that this court misread Kuhnlein, these are precisely the same arguments previously raised by Appellants (Initial Brief at 13-16) that: (i) Kuhnlein should be limited to its unique facts; (ii) Supreme Court did not intend to hold the refund statute unconstitutional or overrule prior appellate decisions, and (iii) the "other procedural requirements" language of Kuhnlein meant compliance with the refund statute. These arguments have been rejected. Appellants have simply re-argued their position without demonstrating an independent basis for clarification.

Appellants' suggestion that there are five new questions left unresolved by this court's opinion are matters for which answers already exist. Appellants have simply failed and refused to accept the answers. For example, the supposed concern over whether there needs to be a distinction between "simple" facial constitutional challenges or more complex challenges, a simple reading of both Kuhnlein and our complaint make it clear that, so long as a violation of the federal or state constitution is implicated, sovereign immunity will not exempt the state under the guise of the refund statute because, in the words of Kuhnlein, "any other rule self-evidently would make constitutional law subservient to the State's will." Kuhnlein, 646 So.2d at 721.

The next three purported questions raised by Appellants all concern the proper role of an administrative agency with respect to interpreting its own rules, answering mixed questions concerning constitutional challenges and avoiding a constitutional challenge if at all possible.

Again, this is nothing new. Appellants have already argued that the "other procedural requirements" language of Kuhnlein meant exhausting administrative remedies by complying with the refund statute as a legislative condition precedent to maintaining suit in the circuit court (Initial Brief at 15, 17-21; Reply Brief at 8). In response, Appellees urged that the "other procedural requirements" language meant compliance with the procedural and statutory requirements relating to the maintenance of class actions. This court agreed.

Additionally, with respect to Appellants' argument that an agency interpretation and exhaustion of administrative remedies should first be pursued, Appellees have already argued that resort to the administrative arena would be futile since the PMATF statute, itself, does not provide any administrative remedy for a protesting taxpayer seeking a refund, nor does the refund statute appear to cover assessments paid under the PMATF statute (Answer Brief at 29). Futility also exists because of the extreme improbability that the Agency for Health Care Administration would agree with our protesting taxpayers that the PMATF statute is facially unconstitutional and therefore illegal and unenforceable.

Finally, with respect to Appellees' suggestion that the Agency should have the right to answer these questions administratively before being hauled off to court, the only challenges and concerns raised by Appellees herein concern the facial unconstitutionality of the PMATF statute. Florida law is quite clear that the facial constitutionality of a statute may not be decided in an administrative proceeding. Department of Revenue v. Young American Builders, 330 So.2d 864 (Fla. 1st DCA 1976). Similarly, when administrative proceedings can have no effect on the constitutional issue presented to a circuit court, "it is pointless to require applicants to endure the time and expense of full administrative proceedings." Gulf

Pines Memorial Park, Inc. v. Oakland Memorial Park, Inc., 361 So.2d 695, 699 (Fla. 1978), as cited with approval in Key Haven Associated Enterprises, Inc. v. Board of Trustees of the Internal and Improvement Trust Fund, 427 So.2d 153 (Fla. 1982); *see also*, Smith v. Willis, 415 So.2d 1331 (Fla. 1st DCA 1982).

The fifth and final "question" supposedly left unresolved deals with the timeliness issue for filing a refund. This ground is also urged as a basis for rehearing and addressed hereinbelow.

Rehearing - "Timeliness"

As concerns the portion of Appellant's Motion seeking rehearing on the "timeliness" issue and failure to consider the Third District's opinion in Westring v. Department of Revenue, 682 So.2d 171 (Fla. 3d DCA 1996), it is clear that the virtual entirety of the Appellant's prior challenges through this appeal (Initial Brief at 17-21) has been devoted to the notion that the refund statute is a condition precedent to suit or certifying a class action. Now, through its Motion for Rehearing, Appellants are arguing that there was a separate and distinct issue not addressed by this court of whether failure to comply with the refund statute would bar a claim by a party paying an assessment more than three years before (Motion at 4). This particular issue is not ripe for appeal or rehearing and, in any event, is improperly raised for the first time in Appellees' Motion. Sarmiento v. State, 341 So.2d 1047 (Fla. 3d DCA 1979); and, Price Wise Buying Group v. Nuzum, 343 So.2d 115 (Fla. 1st DCA 1977).

First, Appellants urge that the claim of Appellee class representatives Hameroff and Gateway should be barred because its assessment was paid in 1991, no refund application was filed and the present suit was not commenced in the trial court until 1995. Factually this is

correct. However, this issue has been raised in Appellants' affirmative defenses which is pending in the trial court and has not been decided. The order under review has not addressed the merits of Appellants' argument and it is inappropriate to raise the issue on rehearing.

Secondly, even if remotely or indirectly addressed, the issue of whether a refund claim is barred for non-compliance with the three year refund statute can only be decided once it is determined -- by either the trial court or this court -- that the non-claim provisions of the refund statute are applicable to this constitutionally-based challenge. The trial court's order concerned, exclusively, whether the numerosity, commonality, typicality and adequacy of representation requirements under Florida Rule of Civil Procedure 1.220(a) had been satisfied for the purpose of certifying this class. The statute of limitations or non-claim effect of the refund statute has not yet been addressed such that this issue is not right for appeal.

Notwithstanding, Appellees acknowledge that it may be appropriate for this court to consider this issue since it has now been briefed by the parties. Very little further analysis is required beyond simply re-reading the applicable provisions of the Supreme Court's decision in Kuhnlein.

Specifically, in Kuhnlein, the State presented the identical arguments urged by Appellants herein: first, for their failure to file a refund request prior to suit the class plaintiffs lacked standing and the trial court lacked jurisdiction; secondly, that strict compliance with the tax refund statute is the only means to invoke State's limited waiver of sovereign immunity.

The Kuhnlein court rejected both arguments as has the trial court hereinbelow. However, the procedural distinctions between our cases are significant. This appeal challenges a non-final order certifying a class over the objection that a condition precedent to filing suit

was not met. In Kuhnlein, the order under review was a final summary judgment in which the trial court found that the auto impact fee was unconstitutional under the Commerce Clause and ordered an immediate refund. When the case reached the Supreme Court, the full merits of all of the constitutional issues had already been presented and decided.

Therefore, in Kuhnlein the court found the refund statute was not applicable at all because the challenges to the auto impact fee statute were based upon violations of federal and state constitutional law. Full refunds were ordered. In response to some of the State's arguments that the refund claims were barred -- the same claims urged by Appellants' Motion herein in their supposed "second" issue not reached by this court -- the Kuhnlein Supreme Court held specifically that:

> Even if true, these are not proper reasons to bar a claim based on constitutional concerns. Sovereign immunity does not exempt the state from a challenge based on violation of these federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. Moreover, neither the common law nor a state statute can supersede a provision of the federal or state constitutions.

646 So.2d at 721 (emphasis in original), also cited in this court's Opinion at 3-4. Accordingly, it may well be appropriate for this court, at this juncture, to now decide that the refund statute is not applicable either as a condition precedent or as an eventual bar to refunds sought by the class representatives and all others similarly situated if it is eventually established by Appellees that the PMATF statute is unconstitutional.

Rehearing - *Westring*

The Appellant's second ground for rehearing urges that this court did not address the Third District's opinion in Westring v. Department of Revenue. It is apparent that this court

..was cognizant of Westring but chose to place little reliance on it. This treatment is consistent with the Supreme Court's opinion in Kuhnlein, especially since Westring was not a constitutionally-based challenge. Appellants rely upon Westring for its apparent reaffirmation of the importance of State ex rel. Victor Chemical Works v. Gay, 74 So.2d 560 (Fla. 1954) in which the Supreme Court held that a refund claim must first be filed pursuant to the statute before one may make a challenge in the circuit court. The ruling is interesting but of little persuasive or controlling effect here. In any event, while Victor Chemical may still stand for the proposition that strict compliance with the procedural requirements of the refund statute must be adhered to, the case did not deal with a constitutionally-based challenge to a taxing statute as was present in Kuhnlein and our case. Therefore, neither Victor Chemical nor the Third District's reliance on it in Westring are of any real consequence for the purpose of affirming the trial court's certification of our class because the real focal point for certification was whether the refund statute should be viewed as a condition precedent to this constitutionally-based challenge. This court correctly decided that it is not.

Rehearing *En Banc*

The Appellant's arguments are falsely premised upon the notion that this case, in its present posture, presents an opportunity to reconsider or clarify the Supreme Court's decision in Kuhnlein. The Appellants falsely assume that this court "created" the exception for constitutionally-based challenges to taxing statutes. It is quite clear that this court merely followed the unambiguous ruling in Kuhnlein that an exception to the general rule established by Devlin v. Dickinson, 305 So.2d 848 (Fla. 1st DCA 1975), and similar cases, was created

in Kuhnlein such that a party need no longer first seek and be denied a refund before filing suit in constitutionally-based refund actions.

The Appellants mistakenly suggest that this court expressly overruled or receded from prior First District Court of Appeal decisions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via ☑ U.S. Mail, ☐ hand-delivery and/or ☐ facsimile transmission to **Eric J. Taylor, Esquire**, and **Susan Stephens, Esquire**, Office of the Attorney General, State of Florida, The Capitol, Special Projects, Tallahassee, Florida 32399-1050, this 14 of March, 1997.

Murray B. Silverstein, Esquire

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

NATHAN M. HAMEROFF, M.D.,
et. al.,

Plaintiffs,

v.

CASE NO. CV 95-05936

PUBLIC MEDICAL ASSISTANCE
TRUST FUND; et. al.,

Defendants.
_____/

ORDER

THIS MATTER came before the Court on June 26, 1996 on Plaintiffs' Motion to Approve Form of Notice of Class Action and Plaintiffs' Motion to Stay Enforcement, Collection, and Abate Accrual of Penalties During Pendency Litigation. The Court, having reviewed and considered the Plaintiffs' Motions and memoranda, other materials in the file, and otherwise being advised that the parties are in agreement, it is

ORDERED AND ADJUDGED:

1. The form of the "Notice of Pendency of Class Action" (with dates omitted) (attached hereto as Exhibits A and B) is approved. However, because Defendants have noticed their appeal of the Order dated May 2, 1996 certifying this case as a class action, thus staying the effect of that order pursuant to Rule 9.130(f), Fla. R. App. P., no distribution of the Notice is appropriate while the appeal is pending.

2. Plaintiffs' Motion to Stay Enforcement, Collection, and Abate Accrual of Penalties During Pendency Litigation is GRANTED for those Plaintiffs who pay current contested

assessment amounts into a Court-supervised interest-bearing account and thereafter continue to report and pay future assessments into that account during the pendency of this action and until further Order of this Court. The purpose of this account is to protect the Plaintiffs from further collection enforcement efforts during the pendency of this litigation and to provide a readily identifiable fund - to include the principal amount of the assessments and accrued interest - which will be available to AHCA in the event it prevails in this action. Alternatively, in the event Plaintiffs prevail, they will receive back from the account the amounts paid, including interest.

3. Defendants are otherwise ordered to stay enforcement, collection and to abate accrual of penalties for those Plaintiffs who submit assessment amounts into the account and who make timely reports and payments of future assessments thereafter as stated above within thirty (30) days of the respective due dates of each.

4. In furtherance of Plaintiffs' Motion, Plaintiffs' counsel are authorized and directed to open an interest-bearing account pursuant to this Court Order, to file and serve an initial report within forty-five (45) days hereof of deposits made into the account, and to thereafter file and serve monthly account statements with Defendants' counsel and with the Court upon their receipt from the bank retained by Plaintiffs for the purposes prescribed in this Order.

DONE and ORDERED in Chambers this 1st day of ~~June, 1996~~ July, 1996.

William R. Gary

WILLIAM GARY
Circuit Judge

cc: Counsel for Parties

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
CIRCUIT CIVIL CASE NO. CV 95-05936

NATHAN M. HAMEROFF, M.D., GATEWAY RADIOLOGY CONSULTANTS, P.A., a professional services corporation, d/b/a GATEWAY RADIOLOGY CONSULTANTS; BAY AREA HEART CENTER, P.A., a professional services corporation; and CARDIOLOGY SPECIALISTS, P.A., a professional services corporation; and, CARDIOVASCULAR ASSOCIATES, INC., a Florida corporation, both individually and on behalf of all others similarly situated,

Plaintiffs,

CLASS REPRESENTATION

vs.

PUBLIC MEDICAL ASSISTANCE TRUST FUND; AGENCY FOR HEALTH CARE ADMINISTRATION; DOUGLAS M. COOK, in his official capacity as the Director of the Agency for Health Care Administration; DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION; RICHARD T. FARRELL, in his official capacity as Secretary of the Department of Business and Professional Regulation; THE STATE OF FLORIDA; LAWTON CHILES, in his official capacity as Governor and Chief Executive Officer of The State of Florida; and, ROBERT F. MILLIGAN, in his official capacity as Comptroller of the State of Florida.

Defendants.
_____/

NOTICE OF PENDENCY OF CLASS ACTION

TO: All physicians and physician-owned medical practices which have been deemed, through the Agency for Health Care Administration's ("AHCA") interpretation, administration and enforcement of the Public Medical Assistance Trust Fund Statute ("PMATF") to be free-standing diagnostic imaging centers liable for reporting and payment of a 1.5% assessment on net operating revenues and any interest or penalties associated therewith.

YOU ARE HEREBY NOTIFIED, pursuant to Rule 1.220(b)(2) of the Florida Rules of Civil Procedure that there is a Class Action lawsuit pending in this Court for declaratory and injunctive relief, an accounting, claims for refund and related monetary relief. The action was

EXHIBIT "A"

filed by the above-listed plaintiffs challenging the constitutionality of the PMATF Statute, Section 395.7015(2)(b), Florida Statutes (1995). On May 2, 1996, this Court certified this case as a Class Action defined as "all physicians and physician-owned medical practices which have been deemed, through AHCA's interpretation, administration and enforcement of the PMATF Statute to be free-standing diagnostic imaging centers under Section 395.7015(2)(b), Florida Statutes and liable for reporting and payment of a 1.5% assessment and any penalties under the Statute" (the "Class").

The Plaintiffs charge that this PMATF tax, which became effective against them in 1991, is facially unconstitutional for improperly classifying the physician and physician-owned medical practices as free-standing diagnostic imaging centers in violation of state and federal constitutional provisions, including the guarantees of equal protection under the law as set forth in Article I, Section 2 of the Florida Constitution and the Fourteenth Amendment to the U.S. Constitution. Plaintiffs further charge that the PMATF Statute unlawfully permits AHCA to assess and collect penalties not authorized by law; is a tax not made in pursuance of law as required under Article VII of the Florida Constitution; represents an unlawful delegation of unrestricted discretion to an administrative agency (AHCA) in violation of Article II, Section 3 of the Florida Constitution; improperly attempts to incorporate by reference another chapter of the Florida Statutes in order to administer the PMATF; is a special law attempting to regulate an occupation and was enacted without proper notice in violation of Article III, Sections 10 and 11 of the Florida Constitution; violates the single subject and title requirements of Article III, Section 6 of the Florida Constitution; and, contains language so vague and ambiguous as to violate the due process clauses of Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the U.S. Constitution.

For the various constitutional infirmities and violations, the Plaintiffs seek a judicial declaration that the PMATF statute is unconstitutional and have requested an injunction to bar any further enforcement, along with the request for a refund of all amounts actually paid. This Court

has not passed upon the merits of any of the claims, and the Defendants (AHCA and the PMATF) deny Plaintiffs' contentions.

This Court has determined that the Plaintiffs will fairly and adequately represent the members of the Class and that this case is maintainable as a class action under the Florida Rules of Civil Procedure. Publication of this notice is not to be construed in any way as an expression of any opinion by this Court as to the merits of the case. This notice is merely intended to advise you of the pendency of this action and of certain rights that you may have with respect to this action.

NOW, THEREFORE, take notice that:

1. This Court will exclude you from the Plaintiff Class and this lawsuit if you request exclusion in writing post-marked on or before_____. Persons who request exclusion will not be entitled to share in the benefits of a judgment if it is favorable to the Class, and will not be bound by a judgment if it is adverse. If you wish to be excluded, you must send a request for exclusion to the address specified in paragraph 5 below.

2. You will be considered a member of the Class unless you specifically request exclusion. All members of the Class who do not request exclusion (in the manner stated below) will receive the benefit of a favorable decision and will be bound by any adverse judgment. If there is a recovery, this Court will be asked to authorized payment of litigation expenses and attorneys' fees to the counsel for the Class, contingent upon and payable only from any benefits to the Class.

3. If you do not request exclusion from the Class, you are entitled to employ counsel and enter an appearance in this action if you desire.

4. If you do not request exclusion and do not enter an appearance through counsel of your own choosing you will be represented by Plaintiffs, through their counsel, and will be bound by the judgment rendered in this action.

5. If you desire exclusion from the Class, you should write a letter or postcard to the address indicated below, listing (a) your complete name and current mailing address; (b) the date or dates you reported and/or paid any PMATF assessments, penalties and/or interest; and (c) the amounts of money you paid toward any PMATF assessments, together with any penalties and/or interest, with an indication by date of the amounts so paid. All requests for exclusion and communications regarding this notice must be mailed on or before _____ to:

Florida PMATF Litigation
P.O. Box 1689
St. Petersburg, FL 33731-1689

6. This Court has designated the attorneys representing the Class as co-lead counsel as:

Murray B. Silverstein, Esquire
Powell, Carney, Hayes & Silverstein, P.A.
One Progress Plaza, Suite 1210
St. Petersburg, FL 33701
813/898-9011 / Fax 813/898-9014

Cynthia A. Mikos, Esquire
Jacobs, Forlizzo & Neal, P.A.
13577 Feather Sound Dr., Ste. 300
Clearwater, FL 34622-5547
813/527-1727 / Fax 813/572-9454

7. If you do not request exclusion and intend to remain a member of the Class—regardless of whether you enter an appearance through your own counsel or continue your representation through Plaintiffs—the Defendants in this case (AHCA and PMATF) have asserted that you must file a tax refund application under Section 215.26 if, upon prevailing, you wish to recover amounts previously paid. The Defendants have taken the position that any right to a refund is barred three years after any amounts were paid into the State Treasury. While this issue of the need to file a refund application has not yet been decided by the Court, Class Counsel has suggested that the requisite form be complied with even though Class Counsel is vigorously challenging the Defendants' assertions. Therefore, if you have previously paid any PMATF assessment, interest or penalties, you should complete the

refund application form appearing at the bottom of this notice and return to the address shown above in Paragraph 5.

BY ORDER of the Honorable William Gary, Circuit Judge, of the Circuit Court of the Ninth Judicial Circuit Court, Leon County, Florida.

DAVE LANG
Clerk of Circuit Court

Dated:_____

Application for Refund
From
State of Florida

STATE OF FLORIDA)
COUNTY OF _____)

Pursuant to the provisions of Section 215.26, or Section 395.7015, Florida Statutes, I hereby apply for a refund and request that a State Warrant be drawn in favor of:

NAME:_____

SS#/FEIN#:_____ AHCA# (if applicable):_____

ADDRESS: _____
_____

AMOUNTS PAID: _____ REPORTING PERIOD: _____
_____ _____
_____ _____
_____ _____

Which represents moneys I paid into the State Treasury subject to refund, and to substantiate such claim the following facts are submitted:

Reason for Claim: The PMATF assessment is an illegal, unconstitutional and unenforceable tax.
_____
_____

Certified True and Correct this _____ day of _____, 1996.

_____
Signature

PRESS RELEASE

On May 2, 1996, Tallahassee Circuit Court Judge William Gary certified a class action lawsuit against Florida's Agency for Health Care Administration ("AHCA"), and Florida's Public Medical Assistance Trust Fund ("PMATF") and certain other officials and executive officers, relating to the alleged unconstitutionality of Florida's Public Medical Assistance Trust Fund statute (§ 395.7015(2)(b), Fla. Stat.(1995)).

The PMATF tax, as applied to physicians and physician-owned medical practices, became effective in 1991 and imposes a 1.5% assessment upon the affected physicians. The Class includes "all physicians and physician-owned medical practices which have been deemed, through AHCA's interpretation, administration and enforcement of the PMATF statute, to be free-standing diagnostic imaging centers liable for reporting and payment of the 1.5% assessment and any penalties under the Statute."

The Plaintiffs charge that this PMATF tax, which became effective against them in 1991, is facially unconstitutional for improperly classifying the physician and physician-owned medical practices as free-standing diagnostic imaging centers in violation of state and federal constitutional provisions, including the guarantees of equal protection under the law as set forth in Article I, Section 2 of the Florida Constitution and the Fourteenth Amendment to the U.S. Constitution. Plaintiffs further charge that the PMATF statute unlawfully permits AHCA to assess and collect penalties not authorized by law; is a tax not made in pursuance of law as required under Article VII of the Florida Constitution; represents an unlawful delegation of unrestricted discretion to an administrative agency (AHCA) in violation of Article II, Section 3 of the Florida Constitution; improperly attempts to incorporate by reference another chapter of the Florida Statutes in order to administer the PMATF; is a special law attempting to regulate an occupation and was enacted without proper notice in violation of Article III; Sections 10 and 11 of the Florida Constitution; violates the single subject and title requirements of Article III, Section 6 of the Florida Constitution; and, contains language so vague and ambiguous as to violate the due process clauses of Article I, Section 9 of the Florida Constitution and the Fourteenth Amendment to the U.S. Constitution.

For the various constitutional infirmities and violations, the Plaintiffs seek a judicial declaration that the PMATF statute is unconstitutional and have requested an injunction to bar any further enforcement, along with the request for a refund of all amounts actually paid. This Court has not passed upon the merits of any of the claims, and the Defendants (AHCA and the PMATF) deny Plaintiffs' contentions.

This Court has determined that the Plaintiffs will fairly and adequately represent the members of the Class and that this case is maintainable as a class action under the Florida Rules of Civil Procedure. Publication of this notice is not to be construed in any way as an expression of any opinion by this Court as to the merits of the case.

EXHIBIT "B"

The Court has designated the attorneys representing the Class as co-lead counsel as:

Murray B. Silverstein, Esquire
Powell, Carney, Hayes & Silverstein, P.A.
One Progress Plaza, Suite 1210
St. Petersburg, FL 33701
813/898-9011 / Fax 813/898-9014

Cynthia A. Mikos, Esquire
Jacobs, Forlizzo & Neal, P.A.
13577 Feather Sound Dr., Ste. 300
Clearwater, FL 34622-5547
813/571-1727 / Fax 813/572-9454

Physicians and physician-owned medical practices who have paid the PMATF tax or applicable interest or penalties, or who have been subjected to the reporting requirements of the PMATF tax need not do anything further to be included in the Class. If, however, they desire to be excluded from the Class, they must write a letter or postcard stating their name and address, the date on which they paid and/or reported under the PMATF, and the amounts paid. Requests for exclusion and any other communications must be postmarked by _____ and mailed to:

Florida PMATF Litigation
P.O. Box 1689
St. Petersburg, FL 33731-1689