OA 2.3.98

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

PUBLIC MEDICAL ASSISTANCE TRUST FUND; et. al.,

Petitioners,

vs. Case No. 90,326

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

Respondents.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' INITIAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 337609

Office of the Attorney General
The Capitol - Tax Section
Tallahassee, Florida 32399-1050
(850) 414-3300
(850) 488-5865 FAX

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

NATURE OF THE APPEAL 1

STATEMENT OF THE CASE AND FACTS 2

1. STATEMENT OF THE FACTS 2

2. STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. THE RESPONDENTS WERE REQUIRED TO STRICTLY FOLLOW THE LEGISLATIVE MANDATE AND LANGUAGE OF SECTION 215.26, FLORIDA STATUTES 8

A. ALL TAXPAYERS SEEKING A REFUND MUST FILE A TIMELY REFUND APPLICATION, PURSUANT TO SECTION 215.26, FLORIDA STATUTES, WITH THE COMPTROLLER. 8

1. THE LEGISLATURE, THROUGH SECTION 215.26, FLORIDA STATUTES, REQUIRES ALL TAXPAYERS SEEKING A REFUND TO FIRST APPLY FOR A REFUND FROM THE COMPTROLLER. 8

2. OTHER JURISDICTIONAL CONDITIONS PRECEDENT 16

II. A REFUND CLAIM IS BARRED WHEN NO REFUND APPLICATION WAS TIMELY FILED BY A TAXPAYER PURSUANTTO THE TIME PERIOD SPECIFIED IN SECTION 215.26(2), FLORIDA STATUTES. 18

A. CONGRESS, THE UNITED STATES SUPREME COURT AND STATE SUPREME COURTS RECOGNIZE PROCEDURAL FILING AND TIMELY FILING REQUIREMENTS IN TAX REFUND CASES 20

1. THE UNITED STATES GOVERNMENT 21

a. 26 U.S.C. Section 7422(a) - Requirement for a Written Claim. 21

b. 26 U.S.C. Section 6511 - Timely Filing of the Refund Claim. 22

2. STATE TIME LIMITS AND REFUND CLAIMS. 25

III. THE CLASS ACTION PROCEDURE CANNOT BE USED WHEN LEGISLATIVE "JURISDICTIONAL" STATUTES ARE INVOLVED WHEN TO SO PERMIT A CLASS ACTION WOULD DESTROY THE LEGISLATURE'S VERY "JURISDICTIONAL" INTENT AND PURPOSE; A COURT RULE DOES NOT OVERRIDE A CLEAR AND UNAMBIGUOUS LEGISLATIVE ENACTMENT. 28

CONCLUSION 38

CERTIFICATE OF SERVICE 38

TABLE OF AUTHORITIES

CASES

Arkansas v. Staton,
325 Ark. 341, 942 S.W.2d 804 (1996) 27

Arnett v. U.S.,
845 F. Supp. 796 (D.Kan.1994) 21

Atkins v. Department of Revenue,
320 Or. 713, 894 P.2d 449 (1995) 26

Bailey v. State,
330 N.C. 227, 412 S.E.2d 295 (1991) 25,26,27

Beckman v. Battin,
926 F. Supp. 971 (D.Mont. 1995) 22

Beckwith Realty, Inc. v. U.S.,
896 F.2d 860 (4th Cir. 1990) 22

Benyard v. Wainwright,
322 So. 2d 473 (Fla. 1975) 29

Bohn v. U. S.,
467 F.2d 1278 (8th Cir. 1972) 22

Boyd v. Becker,
627 So. 2d 481 (Fla. 1993) 28,29,30

Bradley v. Williams,
195 W. Va. 180, 465 S.E.2d 180 (1995) 26

Brooks v. Federal Land Bank of Columbia,
106 Fla. 412, 143 So. 749 (1932) 11

Bystrom v. Diaz,
514 So. 2d 1072 (Fla. 1987) 34,35

Central Power & Light Co. v. Sharp,
919 S.W.2d 485 (Tex.App. 1966) 27

Chicago Milwaukee Corp. v. U.S.,
40 F.3d 373 (Fed. Cir. 1994) 22

Clark v. Cook,
481 So. 2d 929 (Fla. 4th DCA 1986) 35

Commissioner of Internal Revenue v. Lundy,
___ U.S. ___, 116 S. Ct. 647 (1996); 22,23,24,25

Commonwealth of Kentucky v. Gossum,
887 S.W.2d 329 (Ky. 1994) 27

Curasi v. U.S.,
907 F. Supp. 373 (M.D. Fla.1995) 22

Davis v. Macedonia Housing Authority,
641 So. 2d 131 (Fla. 1st DCA 1994) 35

Davis v. Michigan Department of Treasury,
489 U.S. 803, 109 S. Ct. 1500 (1989) 25

Department of Revenue v. Kuhnlein,
646 So. 2d 717 (Fla. 1994) 4,5

Department of Revenue v. Nu-Life Health and Fitness Center,
623 So. 2d 747 (Fla. 1st DCA 1992) 33,34

Department of Revenue v. Rudd,
545 So. 2d 369 (Fla. 1st DCA 1989) 33,35

Estate of Bohn,
174 Arz. 239, 848 P.2d 324 (App. 1992) 27

E.W. Wright v. Reynolds Fasteners, Inc.,
184 So. 2d 699 (Fla. 3rd DCA 1966) 11,12

Exxon Corporation v. Lewis,
371 So. 2d 129 (Fla. 1st DCA 1978) 6,12

Ferry-Morse Seed Co. v Hitchcock,
426 So. 2d 958 (Fla. 1983) 17

Firsdon v. U.S.,
95 F.3d 444 (6th Cir. 1996) 22

Florida Livestock Board v. Hygrade Food Products,
145 So. 2d 535 (Fla. 1st DCA 1962) 6,11,12,15

Gabelman v. C.I.R.,
86 F.3d 609 (6th Cir. 1996) 23

Goulding v. U.S.,
929 F.2d 329 (7th Cir. 1991),
cert. denied, 506 U.S. 865, 113 S. Ct. 188 (1992) 22

Grunwald v. Department of Revenue,
343 So. 2d 973 (Fla. 1st DCA 1977) 6,12

Gulfside Vacations Inc. v. Schultz,
479 So. 2d 776 (Fla. 2d DCA 1985) 36

Gustin v. U.S. I.R.S.,
876 F.2d 485 (5th Cir. 1989) 22

Hall v. Leesburg Medical Center,
651 So. 2d 231 (Fla. 5th DCA 1995) 35

Hansen v. State,
503 So. 2d 1324 (Fla. 1st DCA 1987) 17

Haven Federal Sav. & Loan Ass'n v. Kirian,
579 So. 2d 730 (Fla. 1991) 29

Hirsh v. Crews,
494 So. 2d 260 (Fla. 1st DCA 1986) 2,4,34,35,36,37

Huff v. U.S.,
10 F.3d 1440 (9th Cir. 1993),
cert. denied, ___ U.S. ___, 114 S. Ct. 2706 (1994) 21

Humphreys v. U.S.,
62 F.3d 667 (5th Cir. 1995) 22

In re Woods Estate,
133 Fla. 730, 183 So. 10 (1938) 11

Interlatin Supply, Inc. v. S & M Farm Supply, Inc.,
654 So. 2d 254 (Fla. 3rd DCA),
review denied, 659 So. 2d 1088 (Fla. 1995) 17

Jones v. Liberty Glass Co.,
332 U.S. 524, 68 S. Ct. 229 (1947) 23

Kahl v. Board of County Commissioners of Dade County,
162 So. 2d 522 (Fla. 3rd DCA 1964) 12,18

Kavanagh v. Noble,
322 U.S. 535 (1947) 22

Kreiger v. U. S.,
539 F.2d 317 (3rd Cir. 1976) 23,24

Kuhn v. Department of Revenue,
897 P.2d 792 (Colo.1995) 26

Public Medical Assistance Trust Fund, et al., v. Hameroff,
689 So. 2d 358 (Fla. 1st DCA 1997), review pending, Case No. 90,326 4

Ramos v. State,
505 So. 2d 418 (Fla. 1987) 29

Republic Petroleum Corp. v. U.S.,
613 F.2d 518 (5th Cir. 1980) 21

Reynolds Fasteners, Inc. v. Wright,
197 So. 2d 295 (Fla. 1967) 11,

R.J.A. v. Foster,
603 So. 2d 1167 (Fla. 1992) 30

Roberts v. Seaboard Surety Co.,
29 So. 2d 743 (Fla. 1947) 16

Smith v. Piezo Technology and Professional Administrators,
427 So. 2d 182 (Fla. 1983) 16

S.R. v. State,
346 So. 2d 1018 (Fla. 1977) 30

Stallings v. Oklahoma Tax Commission,
880 P.2d 912 (Okl. 1994) 27

State, Department of Revenue v. Bauta,
691 So. 2d 1173 (Fla. 3rd DCA 1997), review pending, Case No. 91,081 8

State, Department of Revenue v. Brock,
576 So. 2d 848 (Fla. 1st DCA),
rev. denied, 584 So. 2d 997 (Fla. 1991) 13

State, Department of Revenue v. Ray Construction of Okaloosa County,
667 So. 2d 859 (Fla. 1st DCA 1996) 32,33,34

State, Department of Revenue v. Stafford,
646 So. 2d 803 (Fla. 4th DCA 1994) 35

State, ex rel. Butlers Inc. v. Gay,
158 Fla. 164, 27 So. 2d 907 (1946) 10,19

State, ex rel. Butlers Inc. v. Gay,
158 Fla. 500, 29 So. 2d 246 (1947) 10,19

State ex rel. Devlin v. Dickinson,
305 So. 2d 848 (Fla. 1st DCA 1975) 1,2,6,12,19,20,37

State, ex rel. Tampa Electric Company v. Gay,
40 So. 2d 225 (Fla. 1949) 10,19

State ex rel. Victor Chemical Works v. Gay,
74 So. 2d 560 (Fla. 1954) 7,10,11,18,19,20,24,30,38

State v. Furen,
118 So. 2d 6 (Fla. 1960) 29

State v. Garcia,
229 So. 2d 236 (Fla. 1969) 29

State v. Sproles,
672 N.E.2d 1353 (Ind. 1996) 27

Stewart Arms Apartments, Ltd. v. Department of Revenue,
362 So. 2d 1003 (Fla. 4th DCA 1978) 12,20

Stone v. Errecart,
675 A.2d 1322 (Vt. 1996) 13,26

Swanson v. State,
335 N.C. 674, 441 S.E.2d 537 (1994) 26

United States v. Brockamp,
___ U.S. ___, 117 S. Ct. 849 (1997) 23,24

United States v. Dalm,
494 U.S. 596, 110 S. Ct. 1361 (1990) 22,23

United States v. Felt & Tarrant Manufacturing Co.,
283 U.S. 269, 51 S. Ct. 376 (1931) 22

Westring v. Department of Revenue,
682 So. 2d 171 (Fla. 3rd DCA 1996),
review denied, 686 So. 2d 583 (Fla. 1996) 8,9

Whitehurst v. Hernando County,
91 Fla. 509, 107 So. 627 (1926) 18

Wilkinson v. Reese,
540 So. 2d 141 (Fla. 2d DCA 1989) 35

Wright v. Polk County Public Health Unit,
601 So. 2d 1318 (Fla. 2nd DCA 1992) 17

Zeier v. U.S. I.R.S.,
80 F.3d 1360 (9th Cir. 1996) 24

UNITED STATES CODE

26 U.S.C. Section 6511 ..... i,21,22,23,24,25

26 U.S.C. Section 6511 (a) 22

26 U.S.C. Section 6511(b)(1) 22

26 U.S.C. Section 7422 21

26 U.S.C. Section 7422(a) i,21

INTERNAL REVENUE CODE

Section 322(b)(1) I.R.C. (1939) 23

FLORIDA CONSTITUTION

Article V 28

FLORIDA STATUTES

Chapter 72 30,32

Chapter 86 33

Chapter 120 12

Chapter 194 30

Chapter 201 33

Section 26.012(2)(e) 15

Section 72.011 30,32,34,36

Section 72.011(1)(a) 15,30,31

Section 72.011(2) 15,31,32

Section 72.011(3)(a)(b)1.2. 31,32

Section 72.011(4)(a)(b) 32

Section 72.011(5) 32

Section 120.575 32

Section 194.171 30,34,36,37
Section 194.171(2) 34,35,36
Section 194.171(3) 34,35
Section 194.171(5) 34,35
Section 194.171(6) 34,35
Section 215.26 ..... i,1,2,3,4,5,7,8,9,10,11,12,13,14,15,17,18,19,23,28,29,30,36,37,38
Section 215.26(1) 9
Section 215.26(2) i,1,2,3,5,6,7,9,10,18,20
Section 215.26(4) 9
Section 395.7015 1,2,3,14,18
Section 395.7015(2) 37
Section 768.28 16,17
Section 768.28(6) 16
Section 768.28(6)(a) 16
Section 768.28(6)(b) 16,17

LAWS OF FLORIDA

Ch. 94-353, Section 50, p.2563 18

FLORIDA ADMINISTRATIVE CODE

Rule 3A-44.020 13,15
Rule 3A-44.020(1) 9,13
Rule 3A-44.020(2) 10,13,14
Rule 3A-44.020(3) 14
Rule 3A-44.020 (4) 14

FLORIDA RULES OF CIVIL PROCEDURE

Florida Rules of Civil Procedure 1.220 28,36

OTHER STATES STATUTES

A.R.S. Section 42-124(B) 27

Colo. Stat., Section 39-21-108(1) 26

Kentucky Revised Statutes, 134.590 27

Missouri Statutes, 143.801 26

Missouri Statutes, 143.821 26

Oregon Revised Statutes, 305.765 26

West Virginia Code, 11-10-14 26

Wisc. Stats., Section 71.75 26

32 Vermont Statutes 5884 26

F:\USERS\TAX\ERIC\HAMEROFF\FSC\CITES.WPD

PRELIMINARY STATEMENT

Petitioners, Florida's Public Medical Assistance Trust Fund, (hereafter "PMATF") the Agency for Health Care Administration (hereafter "AHCA"), and Douglas M. Cook in his capacity as Executive Director of the Agency for Health Care Administration, were the Defendants below, and will be referred to as "the Petitioners" in the Initial Brief.

Respondents, Nathan M. Hameroff, M.D., et al., were the Plaintiffs below and will be referred to as "the Respondents" in the Initial Brief.

Circuit Court Judge, William F. Gary of the Second Judicial Circuit in and for Leon County, Florida, was the court below and will be referred to as "the trial court" in the Initial Brief.

References to Petitioners' Appendix to its Initial Brief will be prefixed with the word Appendix, followed by the appropriate roman number, e.g., Appendix I.

NATURE OF THE APPEAL

This case comes before this Court from the appeal of a non-final order entered by the trial court. On May 2,1996, the trial court entered an order that certified a class action to challenge to the PMATF, which is imposed upon the Respondents pursuant to Section 395.7015, Florida Statutes (Appendix IX). That Order also permitted the Respondents to seek a refund of their PMATF assessments without complying with the Legislative mandate contained in section 215.26, Florida Statutes. In the First District Court of Appeal the Petitioners asserted that the trial court materially departed from the clear standard of law by certifying a class that:

1) was represented by two class representatives that had not complied with any of the legislative mandates of the refund statute, Section 215.26, Florida Statutes, at the time of filing of the suit, contrary to many of the First District Court's decisions including State ex rel. Devlin v. Dickinson, 305 So. 2d 848, 850 (Fla. 1st DCA 1975);

2) was represented by one class representative that had not complied with the time limitation legislative mandate of the refund statute, Section 215.26(2), Florida Statutes, at the time of filing of the suit and was thus totally barred from ever receiving a refund; and

3) included as class members persons who have paid money into the State Treasury but have not sought or been denied a refund in accordance with Section 215.26, Florida Statutes, contrary to Hirsh v. Crews, 494 So. 2d 260 (Fla. 1st DCA 1986).

The appeal of the trial court's May 2, 1996, class certification Order focused on:

1. those who have paid the tax but have not complied with Section 215.26, Florida Statutes before filing suit; and

2. that part of the trial court's ruling certifying a class of those who have paid the fee when the only representatives of this purported class are either barred by the statute of non-claim, Section 215.26(2), Florida Statutes, or is the only party who has to date applied for a refund, pursuant to Section 215.26, of the money paid (but did so only after the initiation of the suit and as of yet has not yet been denied a refund).

The Petitioners challenged the trial court's certification of a class consisting of those who have paid but not yet applied for or been denied a refund as required by Section 215.26.[1]/ That part of the trial court's class certification order, the Petitioners asserted, was in direct conflict with the First District's rulings in State ex rel. Devlin v. Dickinson, 305 So. 2d 848, 850 (Fla. 1st DCA 1975); Medley Investors, Ltd. v. Lewis, 465 So. 2d 1305 (Fla. 1st DCA 1985); and, Hirsh v. Crews, 494 So. 2d 260 (Fla. 1st DCA 1986).

STATEMENT OF THE FACTS AND CASE

1. STATEMENT OF THE FACTS

The Respondents, Dr. Nathan M Hameroff, M.D, and his practice, Gateway Radiology Associates, P.A., (hereafter "Gateway"), paid the assessment imposed pursuant to Section 395.7015, Florida Statutes, in 1991. Respondents brought this suit in 1995, more than three years after the date of payment of its assessment pursuant to Section 395.7015, Florida Statutes, to AHCA. (Affidavit, Appendix VII). Gateway never complied with Section 215.26, Florida Statutes, which expressly requires a refund application and a formal denial before filing suit to recover taxes paid.

---

[1]/ The appeal did not concern those persons who are only challenging the statute and only seek a declaration and injunction. Those parties can proceed to the merits without class certification if they chose to do so.

2. STATEMENT OF THE CASE

The Respondents' action seeks to challenge Section 395.7015, Florida Statutes. The statute imposes an assessment of a 1.5% tax on their annual revenues required by Section 395.7015, Florida Statutes, the Public Medical Assistance Trust Fund (PMATF) against "health care entities." That tax is deposited in the PMATF. Complaint (Appendix I). The Respondents seek to have Section 395.7015, Florida Statutes, declared unconstitutional, to prohibit future assessments and collections of the tax and to receive a refund of taxes paid. Complaint. Appendix I.

The Respondents claim consists of two separate and distinct parts based upon the relief requested. The first part is a request for declaratory relief and future injunctive relief. This relief seeks to halt all present collections of taxes and to stop future assessments by the Petitioners.

The second part of the Respondents' Complaint is a request for a refund of the taxes already paid under Section 395.7015, Florida Statutes. The Respondents seek judicially ordered refund of the monies paid to the Petitioner, AHCA. However, only two of the Respondents have paid the tax assessments imposed by Section 395.7015, Florida Statutes. The Respondents, Bay Area Heart Center, P.A., (hereafter "Bay Area"),and Gateway have paid the tax. Bay Area filed a refund request with AHCA, as required by Section 215. 26, Florida Statutes, but only after the initiation of this case. (Affidavit, Appendix VII). AHCA has yet to deny Bay Area's refund request. Respondent Gateway paid its assessment more than three years ago and has yet to file a refund request pursuant to Section 215.26, Florida Statutes, with AHCA. (Affidavit, Appendix VII). Petitioners assert that Respondent Gateway is now jurisdictionally time barred by Section 215.26(2), Florida Statutes, from requesting and receiving a refund of monies paid.

The Respondents brought this case as a class action to include all health care entities subject to the assessment under Section 395.7015, Florida Statutes, including both those who have paid the tax and those who have not paid the tax. The Respondents moved to have their

case certified as a class action (Motion, Appendix VI) including both types of Respondents. The Petitioners opposed the motion. (Appendix VII). The trial court certified the case as a class action on May 2, 1996, regardless of the lack of the class representatives and members individual compliance with Section 215.26 Florida Statutes. (Order, Appendix IX). Thus, the class is to include not only those who have paid the assessment, but also those who have not paid the assessment, not complied with the refund statute, or both.

In fact, the four class leaders of the certified class include two class representatives who have not paid the tax at all, one who paid the tax but did not file for a refund in compliance with Section 215.26, Florida Statutes, before the initiation of the suit and has not yet been denied a refund, and one who has paid the tax but paid more than three (3) years before the initiation of the lawsuit. (Affidavit, Appendix VII).

This class certification of the tax refund case is in direct conflict with the First District's decisions of State ex rel. Devlin v. Dickinson, 305 So. 2d 848, 850 (Fla. 1st DCA 1975); Medley Investors, Ltd. v. Lewis, 465 So. 2d 1305 (Fla. 1st DCA 1985); and also, Hirsh v. Crews, 494 So. 2d 260 (Fla. 1st DCA 1986). The trial court's certification order violates state sovereign immunity and does not conform with this Court's binding decisions and Section 215.26, Florida Statutes.

On 1997, the First District Court issued its opinion styled Public Medical Assistance Trust Fund, et al., v. Hameroff, 689 So. 2d 358 (Fla. 1st DCA 1997) (Appendix X). That Court stated that this Court, in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), created "an exception to the general rule . . . which requires a party to first seek and be denied a refund before filing suit for a tax refund." Public Medical Assistance Trust Fund, et al., v. Hameroff, 689 So. 2d, at 359.

On February 28, 1997, the Petitioners filed a Motion for Clarification, Rehearing and Rehearing *en Banc*, (Appendix XI), raising the following issues:

Clarification The Panel stated that Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994) created "an exception to the general rule . . . which requires a party to first seek and be denied a refund before filing suit for a tax refund." The Supreme Court did not create an "exception," and did not eviscerate the requirements of Section 215.26, Florida Statutes. If the Panel believes that an "exception" has been created for "constitutionally-based" refund actions, the State needs clarification of just what is a "constitutionally-based" refund action.

Rehearing The Court did not address the issue or resolve one of the issues presented by the Appellants. This issue, the requirement of a "timely" filing of a refund claim under Section 215.26(2), Florida statutes, is separate and distinct issue from the requirement of filing a claim. The issue of timely filing exists because one of the Appellees, and some of the class, paid the assessment more than 3 years ago before the filing of this lawsuit.

Rehearing En Banc The panel has overruled or reversed at least 5 decisions of this Court. A panel may not overrule or reverse decisions of the court that may be done solely by the court sitting *en banc*.

The Petitioners asserted that the First District's decision erred because a review of this Court's Kuhnlein decision reveals no such statement by this Court. This Court did not discuss or expressly state it was creating an "exception" to the procedural requirements of Section 215.26, Florida Statutes, beyond the particular circumstances of the Kuhnlein case. The Petitioners also raised the question that a statement of "general exception," without a detailed description of just what the exception included, left the following unanswered questions:

1. Since Kuhnlein only concerned a simple "facial" constitutional challenge, is the panel limiting the exception to Section 215.26, Florida Statutes, to simply sole count "facial" constitutional challenges?[2]/

2. What about "as applied" constitutional challenges? These are challenges that may be avoided by an agency interpretation to the statute and rules;

---

[2]/ The Complaint in this case includes more than simple "facial" challenges.

3. What about case that include non-constitutional based challenges, that can be addressed by the agency, mixed with "facial" challenges?[3]/ Does not the agency have the right to attempt to answer these questions administratively before being hauled off to court?;

4. What happens to the doctrine to avoid constitutional challenges if at all possible? Requiring all refund applications to go to the proper agency can result in a refund without the need to address a constitutional question;

5. What effect does this "exception" have on the time in which to file for a refund?

The Petitioners also raised the timeliness issue, yet the First District's decision did not address the issue. By its affirmance left as a class representative a taxpayer who is barred by the language of Section 215.26(2), Florida Statutes, and permitted the class to include persons that are out of time under Section 215.26(2), Florida Statutes, thus eviscerating this nonclaim statute.

Finally, by its decision, the First District overrode, without any explanation whatsoever, five (5) of its previous decisions requiring strict compliance with Section 215.26, Florida Statutes. Those decisions were Florida Livestock Board v. Hygrade Food Products Corporation, 145 So. 2d 535 (Fla. 1st DCA 1962), Devlin v. Dickinson, 305 So. 2d 848 (Fla. 1st DCA 1975); Grunwald v. Department of Revenue, 343 So. 2d 973 (Fla. 1st DCA 1977); Exxon Corporation v. Lewis, 371 So. 2d 129 (Fla. 1st DCA 1978); and, Medley Investors, Ltd. v. Lewis, 465 So. 2d 1305 (Fla. 1st DCA 1985).

The First District denied the Petitioners' Motion for Clarification, Rehearing and Rehearing *en Banc* (Appendix XII) without addressing any of the questions raised by the Petitioners.

---

[3]/ The Petitioners would assert that this contains a number of issues that may be addressed by AHCA. The Respondents claim that they should not be included in those entities that are assessed. If so, the proper step, before going to court, would be to present that evidence in a refund application. If the Respondents should not have been assessed, then a refund could be issued and a need for suit resolved.

SUMMARY OF THE ARGUMENT

Requests for refunds of monies paid into the State Treasury are controlled, in procedure and remedy, by Section 215.26, Florida Statutes. The two legislative conditions precedent to receiving a refund of monies from the State Treasury are that the taxpayer 1) make an application with the Comptroller, or his designee, in writing; and 2) file such a written application within the time period specified in Section 215.26, Florida Statutes, from the date the tax, fee or assessment was paid to the State. If no refund request is taken within the statutory time period, the right to a refund is forever barred.

For the Respondnets to seek a refund, a refund application would have to have been filed by each taxpayer within three (3) of the date each Respondent remitted their assessment to AHCA. Section 215.26(2), Florida Statutes. The two class Respondents did not file any refund request with the Comptroller or his designee prior to the initiation of this suit. For one of the Respondents, no action was taken within the three (3) period stated in Section 215.26(2), Florida Statutes. Consequently, there has never been a "denial of a refund" to either of the two class Respondents.

The trial court improperly continued the action when it held that it did not have jurisdiction under Section 26.012(2)(e), Florida Statutes, to hear this action because the Respondents did not file any refund request with AHCA. The trial court improperly certified a class because in so doing the trial court elevated a rule of court above a legislative substantive statute.

This Court should reaffirm State ex rel. Victor Chemical v. Gay, 74 So. 2d 560 (Fla. 1954) and its holding that one who seeks a refund of monies paid into the state treasury must first file a refund claim with the Comptroller and make a timely claim for a refund, as provided in Section 215.26, Florida Statutes, or be forever barred.

ARGUMENT

I. THE RESPONDENTS WERE REQUIRED TO STRICTLY FOLLOW THE LEGISLATIVE MANDATE AND LANGUAGE OF SECTION 215.26, FLORIDA STATUTES

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

All the procedural requirements set forth in Section 215.26, Florida Statutes, **must** be fully, and timely, met before a taxpayer may receive a refund or seek judicial relief. One must follow the provisions of Section 215.26, Florida Statutes. The requirements of Section 215.26, Florida Statutes, are procedural, exclusive and mandatory. Failure to comply with all of the provisions bars a taxpayer from seeking judicial relief under all circumstances. Since the Respondents failed to comply with any of the provisions of Section 215.26, Florida Statutes, Respondents are jurisdictionally barred from seeking a refund or acquiring judicial relief.

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

On October 19, 1996, the Third District Court of Appeal decided the case of Westring v. Department of Revenue, 682 So. 2d 171 (Fla. 3rd DCA 1996), review denied, 686 So. 2d 583 (Fla. 1996).[4/] In that case, the Third District noted the following facts:

> Westring, suing individually and as the representative of a purported class of similar taxpayers, sought declaratory and injunctive relief and a refund, contending that the [documentary stamp] tax [of Chapter 201, Florida Statutes] was invalidly imposed. The Department of Revenue moved to dismiss on the grounds that no claim for a refund had been filed, . . .

4/ Shortly after its decision in Westring, but prior to its decision in Miami Tire Soles, Inc., v. Department of Revenue, __ So. 2d __, 22 Fla. Law Weekly D1479g, (Fla. 3d DCA June 18, 1997), the Third District decided State, Department of Revenue v. Bauta, 691 So. 2d 1173, (Fla. 3d DCA 1997), review pending, Case No. 91,081, Florida Supreme Court. The Third District, in Bauta, did not have to decide any constitutional claims, either facial or as applied for none were raised in the court below.

Id. at 172. Mr Westring did not file a claim for a refund and the Department moved to dismiss. The Third District affirmed the dismissal, based upon Section 215.26, Florida Statutes, stating

> Under the authority of State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954), [a party] is required to file a claim for a refund pursuant to s. 215.26, Fla. Stat. (1993), before he may invoke the jurisdiction of the circuit court. In Victor Chemical, the supreme court, in dealing with the statute at issue here, quoted with approval a discussion from one of its previous cases regarding statutes of nonclaim arising in the probate context: "where no exemption from the provisions of a statute exists, the court is powerless to create one." Id., at 563 (internal citations omitted)(e.s.).

Westring, 682 So. 2d at 172.

The Third District's holding in Westring, is correct. The only method by which a person who paid money to the State can obtain a refund is by following the specific provisions of Florida's refund statute, Section 215.26, Florida Statutes. The State makes this assertion because Section 215.26, Florida Statutes, is:

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

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

The procedure for requesting a refund is clear and unambiguous. Section 215.26(1), Florida Statutes, sets out the circumstances which give rise to a refund. The grounds for a refund are:

a. An overpayment of any tax, license or account due;
b. A payment where no tax, license or account is due; and
c. Any payment made into the state treasury in error.

Section 215.26(1), Florida Statutes. When a taxpayer believes he has grounds for a refund, the taxpayer is to file a refund application with the Comptroller.[5]/ Section 215.26(2), Florida

---

[5]/ Section 215.26(2), Florida Statute, permits the Comptroller to delegate the authority to accept a refund request and to decide upon its validity. By Rule 3A-44.020(1), Florida Administrative Code, the Comptroller has exercised his discretion and delegated to

Statutes. However, the taxpayer has a time limitation, the taxpayer's application for a refund:

> **shall** be **filed with the Comptroller**, . . ., within 3 years after the right to such refund shall have accrued else such right shall be barred. (e.s.)

This Court has long held that strict compliance with Section 215.26, Florida Statutes, is a must to receive a refund.[6]/ The Supreme Court visited the issue in detail in State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954). This Court began its discussion of Section 215.26, Florida Statutes, with the basic premise of all refund law that:

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

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

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

Id. Two of those conditions are the filing of a refund request under Section 215.26(2), Florida Statutes, and filing a refund application within the specified time. Id.

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

> [W]here no exemption from the provisions of a statute exist, the court is powerless to create one. . . .
>
> * * * * *
>
> * * * the Court is powerless to change the words and clear meaning of the nonclaim statute . . . As was said in the case of Brooks v. Federal Land Bank of

---

AHCA to accept and determine refund requests for taxes and fees administered and collected by that agency. Consequently, in practice a taxpayer applies directly to AHCA for a refund. Rule 3A-44.020(2), Florida Administrative Code.

[6]/ See State, ex rel. Butler's Inc. v. Gay, 158 Fla. 164, 27 So. 2d 907 (1946); State, ex rel. Butler's Inc. v. Gay, 158 Fla. 500, 29 So. 2d 246 (1947); State, ex rel. Tampa Electric Company v. Gay, 40 So. 2d 225 (Fla. 1949).

> Columbia, supra, 'where no exception from the provisions of the statute exist, the court is powerless to create one.' The contention then that equity and good conscience require that the appellant not lose his claim, while very appealing, does not authorize us to change the statute.

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

The issue of procedural compliance by taxpayers came back before this Court in Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295, 197 (Fla. 1967).[7]/ The Supreme Court had to resolve a conflict between Florida Livestock Board v. Hygrade Food Products, 145 So. 2d 535 (Fla. 1st DCA 1962), and Overstreet v. Frederick Cooper Co. 114 So. 2d 333 (Fla. 3rd DCA 1959), as to whether a taxpayer had to first comply with Section 215.26, Florida Statutes, before going to court.[8]/ The Court began by stating the idea behind the legislative compliance

---

[7]/ This was the review of the Third District Court's decision in E.W. Wright v. Reynolds Fasteners, Inc., 184 So. 2d 699 (Fla. 3rd DCA 1966).

[8]/ The Third District ruled after Victor Chemical that a taxpayer did not have to comply with refund statutes in order to receive a refund. Overstreet v. Frederick Cooper Co., supra. The First District Court of Appeal faced the same issue Florida Livestock Board v. Hygrade Food Products Corporation, supra. In that case, the Florida Livestock Board, a state agency, took the position that Section 215.26, and the statute's administrative procedures, controlled Hygrade's right to refund relief. Id., 145 So. 2d at 536. The Board contended that before Hygrade could seek relief in the courts, Hygrade first had to exhaust all the administrative procedures under Section 215.26, Florida Statutes. Id. The First District stated 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, . . ." Id., 145 So. 2d at 537. The First District went on to hold that **before** Hygrade:

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

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

> 'Since Hygrade failed to exhaust its administrative remedy by filing an application

requirement is to avoid costly litigation if the refund is granted by the affected agency because:

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

Reynolds Fasteners, Inc. v. Wright, 197 So. 2d, at 297. This Court then stated:

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

Reynolds Fasteners, 197 So. 2d, at 297. That Court noted the conflict over the "necessity to comply with these statutes." Id. The Supreme Court agreed with the First District's decision in Florida Livestock Board v. Hygrade Food Products, rejecting the contrary conclusion reached in Overstreet v. Frederick Cooper Co., supra. Reynolds Fasteners, 197 So. 2d, at 297. Thus, it is clear that one MUST first comply with the exclusive procedural requirements of Section 215.26, Florida Statutes, before proceeding to initiate an action within the jurisdiction of a circuit court.[9]/

A legislatively administrative mandate, **expressly** written into an act of the Legislature, like Section 215.26, Florida Statutes, is materially different from the judicially created doctrine of "exhaustion of administrative remedies." For example, in cases arising under Chapter 120, Florida Statutes, the doctrine of exhaustion of administrative remedies is a "court-created

---

> for refund of the inspection fees paid by it pursuant to the provisions of and within the time required by the statute, its right to the relief prayed for in its complaint is barred.'

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

prudential doctrine; it is a matter of policy, not power." State, Department of Revenue v. Brock, 576 So. 2d 848, 850 (Fla. 1st DCA), rev. denied, 584 So. 2d 997 (Fla. 1991). See also Lambert v. Rogers, 454 So. 2d 672, 674 n.5 (Fla. 5th DCA 1984)(It reflects a choice by the court not to pre-empt or usurp the administrative process.) Being only a doctrine of court-created deference, the exhaustion of administrative remedies is not jurisdictional. Brock, 576 So. 2d at 850.[10]/ Thus, it may be disregarded in appropriate circumstances.

By contrast, deference to the specific legislative mandate of Section 215.26, Florida Statutes, is not a matter of judicial discretion. The statute provides a specific statutory condition precedent to refund of statutory taxes.

Moreover, there are a number of valid reasons or purposes behind the legislative requirement to file a timely, written request for a refund. Some of those purposes can be gleaned from Rule 3A-44.020, Florida Administrative Code, which states, in pertinent part:

> (1) Authority to accept applications for refund of monies paid into the State Treasury as provided by Section 215.26, Florida Statutes, is herewith delegated to any state agency vested by law with the responsibility for the collection of any tax, license or account due, or to any state agency which has in fact collected any sum represented to be any tax, license or account due, as those terms are used in Section 215.26, Florida Statutes.
>
> (2) Applications for refunds under Section 215.26, Florida Statutes, are to be filed

---

[10]/ The concept of "exclusive procedure and remedy" and the requirement to follow the legislative procedure and remedy, described above, is not unique to Florida. It has been held before that where a legislature makes a procedure and remedy mandatory or mandated, then the exhaustion of that procedure must occur before an aggrieved party can proceed to court, even when there is a constitutional challenge present. See, e.g., McCarthy v. Madigan, 503 U.S. 140, 144 (1992) ["Where Congress specifically mandates, exhaustion is required." citations omitted]; Neff v. State, 116 N.M. 240, 861 P.2d 281 (N.M App. 1993). See also, Stone v. Errecart, 675 A.2d 1322 (Vt. 1996), where a taxpayer, in a income tax refund case, argued, like Petitioners here, that the filing of a refund request "would be futile." The Vermont Supreme Court rejected that assertion as the futility doctrine has "no place, however, in the face of a clear legislative command that exhaustion is required." The Vermont Supreme Court ruled that the words "exclusive remedy of a taxpayer with respect to the refund of monies" was a such a legislative command requiring exhaustion of the legislative procedure. Id. 675 A.2d, at 1322.

initially with that state agency responsible for or which has collected such tax, license or account due or with the Office of the Comptroller. Applications filed with the Comptroller will automatically be forwarded to that state agency which initially collected or is responsible for the collection of any such tax, license or account due.

(3) Any such state agency receiving an application for refund as stated above shall proceed to review the same and to promptly make a determination, as provided by Section 215.26(2), Florida Statutes, of the amount due, if any, under the applicable laws and in accordance with the Rules of that agency.

* * *

(4) Applications for refund should be filed on the Application for Refund form (DBF-AA-4) revised 10-14-94, incorporated herein by reference, available from the Division of Accounting and Auditing of the Department of Banking and Finance, or on such similar form as may have been approved or adopted by that agency responsible for administering any law imposing a tax, license or account due. However, any such form as adopted by any other state agency must contain essentially the same basic information as form DBF-AA-4 together with such other and further information as the adopting agency may require, and such other form must be approved by the Division of Accounting and Auditing of the Department of Banking and Finance prior to the date such form becomes effective for general use.

From this Rule one can see that a number of things the state agency is looking for in the refund application. The reviewing agency needs to know: 1) who is claiming they paid a tax or fee; 2) under what statute is the refund claim sought; 3) whether or not the claimed statute actually imposed a tax or fee on the refund claimant; 4) was the tax or fee paid and how much; 5) the date the fee or tax was paid to the State; and, 6) whether or not that money went into the State Treasury. The agency needs this information to confirm all these facts before it could issue a refund or else it would be wasting State monies.

Since the Respondents are seeking a refund of monies paid under Section 395.7015, Florida Statutes, they were required to file an application for a refund under Section 215.26, Florida Statutes. Since they did not, the trial court erred in certifying this action as a class action instead of dismissing the Respondents' refund claims until the Respondents complied with Section 215.26, Florida Statutes.

The statute at issue here, Section 215.26, Florida Statutes, requires the taxpayer to seek a

refund first from the Comptroller (or, in this case, his designee, AHCA). What the Florida Legislature contemplated in enacting the requirements of Section 215.26, Florida Statutes, was that the agency charged with administering the tax laws would have the opportunity to consider and determine taxability prior to a court action being instituted. If a refund is denied by AHCA, the taxpayer has 60 days within to seek review of this denial in circuit court.[11]/ In fact, the final denial of a refund application is a prerequisite for the taxpayer seeking circuit court jurisdiction.[12]/

This procedure is a common sense approach chosen by the Legislature to avoid unnecessary litigation and to promote judicial economy. By not requiring the Respondents to comply with the requirements of Section 215.26, Florida Statutes, that they first apply for a refund with AHCA and receive a denial, this Court would be holding that the jurisdictional conditions precedent contained in Section 215.26, Florida Statutes, are waived in the circumstances in this case and can be waived in other cases where AHCA or other agency[13]/ or judicial designee takes the position, prior to agency review of the refund application, that the

---

[11]/ This is confirmed by the language of Section 72.011(1)(a), Florida Statutes: "A taxpayer may contest the legality of any assessment or denial of refund of tax ... by filing an action in circuit court ...", and Section 72.011(2), Florida Statutes: "No action may be brought to contest a denial of refund of any tax ... after 60 days from the date the denial becomes final."

[12]/ Section 26.012(2)(e), Florida Statutes, which provides for exclusive jurisdiction in the circuit courts "in all cases involving legality of any ... denial of refund, except as provided in section 72.011 ....."

[13]/ Rule 3A-44.020, Florida Administrative Code, provides that the Comptroller has delegated the authority to accept applications for refund of monies paid into the State Treasury to "any state agency vested by law with the responsibility for the collection of any tax, license or account due, or to any state agency which has in fact collected any sum represented to be any tax, license or account due ...." Thus, the refund procedures articulated in Section 215.26, Florida Statutes, are applicable to a broad range of taxes and fees, including license taxes or permit fees, inspection fees, professional examination fees, corporate filing fees paid to the Department of State, and so forth. See e.g., Florida Livestock Bd. v. Hygrade Food Products Corp., 145 So. 2d 535 (Fla. 1st DCA 1962).

underlying tax, license fee, and so forth, was lawfully imposed, and the action is instituted within the non-claim period. The Petitioners contends that such a holding conflicts with the long-established basic principle that the parties, through their action or inaction, cannot either waive a court's jurisdiction of a matter, or confer jurisdiction upon a court that does not otherwise have it.[14]/ If exception to the statute is made in this case, then it will be made in every case, and the statute would be meaningless.[15]/

2. OTHER JURISDICTIONAL CONDITIONS PRECEDENT.

The Legislature has enacted other such mandatory procedures that **must** be followed in certain types of matters. In those situations where the Legislature has so specified an exclusive procedure and/or remedy, the persons affected by those laws must follow them before proceeding to court. For example, one of the State's best known examples of mandatory procedures is found in Section 768.28, Florida Statutes, the Legislature's waiver of the State's sovereign immunity in torts. Section 768.28, Florida Statutes, contains specific **procedural** requirements that must be met by the injured party before the State may be sued in tort, even when one has admittedly been injured by the State's negligence. Section 768.28(6), Florida Statutes, states, in pertinent part:

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

---

[14]/ See Roberts v. Seaboard Surety Co., 29 So. 2d 743, 748 (Fla. 1947), in which the Florida Supreme Court noted: "[T]he jurisdiction of a court over the subject matter of a cause of action must be conferred by law, and it cannot under any circumstances be conferred on a court as such, by the consent of the parties. It naturally follows that if jurisdiction cannot be conferred by consent, the want thereof cannot be waived by any act of the parties." (e.s.)

[15]/ The Legislature is presumed not to pass meaningless legislation. Smith v. Piezo Technology and Professional Administrators, 427 So. 2d 182 (Fla. 1983).

maintaining an action but shall not be deemed to be elements of the cause of action and shall not affect the date on which the cause of action accrues.

Where these requirements of Section 768.28, Florida Statutes, are not met, the claim against the State is barred and no waiver of immunity is found. Menendez v. North Broward Hospital District, 537 So. 2d 89, 91 (Fla. 1988); Levine v. Dade County School Board, 442 So. 2d 210, 212 (Fla. 1983). C.f. Metropolitan Dade County v. Coats, 559 So. 2d 71 (Fla. 3rd DCA), rev. denied, 569 So. 2d 1279 (Fla. 1990). For example, if no notice of claim is filed with the state agency, the injured plaintiff is procedurally barred from proceeding with the action in court. Wright v. Polk County Public Health Unit, 601 So.2d 1318 (Fla. 2nd DCA 1992); Hansen v. State, 503 So.2d 1324, 1326 (Fla. 1st DCA 1987).

Likewise, a similar statutory condition precedent can be found in Section 578.26, Florida Statutes. This law prohibits a court action over agricultural seeds until a complaint is filed with the Florida Department of Agriculture. As this Court stated in Ferry-Morse Seed Co. v Hitchcock, 426 So. 2d 958, 961 (Fla. 1983):

> One cannot avoid the impact of a law by mere word choice. Whether couched in terms of negligent mislabelling, intentional mislabelling, or breach of warranty through mislabelling, Hitchcock's claim is inextricably bound to section 578.09 labeling requirements and in turn must comply with the statutory conditions imposed on those bringing actions based on that section of the statute.
>
> In order to assert a statutory cause of action, the claimant must comply with all valid condition precedents; for an action cannot be properly commenced until all essential elements of the cause of action are present. 1 Fla.Jur.2d Actions Sec. 30 (1977). The right to recover against the seed dealer is conditioned upon the aggrieved farmer's compliance with the administrative complaint and notice requirements of section 578.26(1).[16]/

In summation, the filing of a refund application and the timely filing of the application requirements contained within Section 215.26, Florida Statutes, are mandatory conditions

---

[16]/ The Third District later confirmed the need to follow those statutory conditions precedent in Interlatin Supply, Inc. v. S & M Farm Supply, Inc., 654 So. 2d 254, (Fla. 3rd DCA), review denied, 659 So. 2d 1088 (Fla. 1995) [Cessation of lawsuit pending compliance with the statutory provisions of Section 578.26, Florida Statutes; "suit against the defendants was premature."]

precedent to any refund action being filed in a circuit court. Accord Whitehurst v. Hernando County, 91 Fla. 509, 107 So. 627, 628 (1926) [statutory requirement is a prerequisite to a right of action]; Kahl v. Board of County Commissioners of Dade County, 162 So. 2d 522, 523 (Fla. 3rd DCA 1964). These conditions are jurisdictional; without full compliance with Section 215.26, Florida Statutes, a circuit court has no jurisdiction to hear the refund case. Id. Since the Respondents are seeking a refund of fees paid under Section 395.7015, Florida Statutes, they were each required to file an application for a refund under Section 215.26, Florida Statutes. Since they did not, the Circuit Court was correct in dismissing the Petitioners' refund claims until Petitioners did comply with Section 215.26, Florida Statutes.

II. A REFUND CLAIM IS BARRED WHEN NO REFUND APPLICATION WAS TIMELY FILED BY A TAXPAYER PURSUANT TO THE TIME PERIOD SPECIFIED IN SECTION 215.26(2), FLORIDA STATUTES.

Under Section 215.26(2), Florida Statutes, a taxpayer is absolutely time barred from requesting any refund more than three (3) years from the date of payment of the tax. The Respondents are partially time barred from ever requesting a refund of taxes paid under Section 395.7015, Florida Statutes, as they each remitted a portion of the fees they collected to the State more than three years before any refund application has been filed by them. The Respondents did not even initiate this lawsuit within three years of much of the payments to the Petitioners. As set forth above, the Respondents were required to follow the mandate of Section 215.26(2), Florida Statutes,[17]/ which states:

> Application for refunds as provided by this section shall be filed with the Comptroller, . . ., **within 3 years** after the right to such refund shall have accrued[18]/ else such right shall be barred.

---

[17]/ In 1994 the Legislature amended Section 215.26(2), Florida Statutes, extending the time within which to file for a refund of taxes, from three years to five years, from the date of payment of the tax. See, Ch. 94-353, Section 50, p.2563, Laws of Florida.

[18]/ This Court, in Victor Chemical, directly addressed the meaning of the term "accrued." The Court stated the issue succinctly there; "[i]t becomes important in this case to

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

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

> "[T]he statutory requirement that the claim be filed in the prescribed time may not be waived."
>
> In short, it is the universal rule that a statute of non-claim runs from the time the taxes are paid and is not postponed until the legality of the tax has been judicially determined. A refund is a matter of grace and if the statute of non-claim is not complied with, the statute becomes an effective bar in law and equity. (e.s.)

Victor Chemical, 74 So. 2d, at 562 (citations omitted). Accord Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814 (Fla. 1988); State, ex rel. Tampa Electric Company v. Gay, 40 So. 2d 225, 228 (Fla. 1949). In fact, this Court thought the issue was resolved earlier, stating "State ex rel. Butler's, Inc., v. Gay, 158 Fla. 164, 27 So. 2d 907 (1946), and State ex rel. Butler's, Inc., v. Gay, 158 Fla. 500, 29 So. 2d 246, 247 (1947), appear to have settled the question by holding that failure to file **written claim**, sworn to on a form to be prescribed by the Comptroller, within [the time prescribed in Section 215.26, Florida Statutes] from the date of the payment barred the claim." Victor Chemical, 74 So. 2d at 563.[19]/

---

determine when the right to a refund 'accrued'." Id., at 561. After holding that Section 215.26, Florida Statutes, was a statute of non-claim, as opposed to a statute of limitations, this Court stated:

> a statute of non-claim runs from the time the taxes are paid and is not postponed until the legality of the tax has been judicially determined.

Victor Chemical, 74 So. 2d, at 562.

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

However, Florida requires a taxpayer to apply for a refund of illegally imposed

Because of the nature of a statute of non-claim, the time to file for a refund is not tolled while the pleader tries some other form of action. A statute of non-claim is not like a statute of limitations that can be tolled. This Court made that clear in Victor Chemical, 74 So. 2d, at 562 ("a statute of non-claim runs from the time the taxes are paid and is not postponed until the legality of the tax has been determined."). Finally, this Court reiterated the rule that "where no exemption from the provision of a non-claim statute exists, a court is powerless to create one." Victor Chemical, 74 So. 2d, at 563.

A. CONGRESS, THE UNITED STATES SUPREME COURT AND STATE SUPREME COURTS RECOGNIZE PROCEDURAL FILING AND TIMELY FILING REQUIREMENTS IN TAX REFUND CASES.

While attacking state law, the Respondents have forgotten that United States Government and the other States have enacted procedural laws in tax refund cases. These laws, either separately stated or joined together into one law, require the aggrieved taxpayer to **both** file a written refund claim with the appropriate agency and file the written refund claim within a period of time stated in the statute. Uniformly, when these procedural statutes have been attacked, even when the tax is being sought to be declared unconstitutional, the United states Supreme Court and the various State supreme courts have upheld these procedural statutes requiring the taxpayer to fully and timely comply with the provisions contained therein.

---

taxes within a certain time period and unless this is done, no refund is available. (e.s.)

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

1. THE UNITED STATES GOVERNMENT.

Congress, like the various states, has enacted laws effecting refunds of monies paid to the United States Internal Revenue Service. Congress, in two separate statutes, 26 U.S.C. Section 7422(a) and 26 U.S.C. Section 6511, require both a written claim for a refund and a time limit in which to file such a claim. Both will be addressed in turn.

a. 26 U.S.C. Section 7422(a) - Requirement for a Written Claim.

Having stated that legislative procedural bars can bar a refund claim, it is no wonder the United States Supreme Court and other federal courts have upheld strict compliance with jurisdictional mandates. The Internal Revenue Code has a statute that specifically requires the filing of a claim for a refund of federal taxes or the federal court has no jurisdiction to hear the matter. 26 U.S.C. Section 7422(a) states in full:

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

With the clear language of Section 7422 present, it is no surprise that federal case law is replete with cases holding that taxpayers are required to file a claim for refund with the Secretary of Treasury prior[20]/ to bringing suit and may not file a suit in district court to obtain tax refund until such claim is filed. See, e.g., Huff v. U.S., 10 F.3d 1440 (9th Cir. 1993), cert. denied, ___ U.S. ___, 114 S.Ct. 2706 (1994); Republic Petroleum Corp. v. U.S., 613 F.2d 518 (5th Cir. 1980). Stated succinctly, the timely filing of a proper claim for refund is a jurisdictional

---

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

prerequisite to a refund suit.[21]/ Commissioner of Internal Revenue v. Lundy, ___ U.S. ___, 116 S.Ct. 647, 651 (1996); United States v. Dalm, 494 U.S. 596, 601-02, 110 S.Ct. 1361, 1364-65 (1990). See also, e.g. Firsdon v. U.S., 95 F.3d 444 (6th Cir. 1996); Humphreys v. U.S., 62 F.3d 667 (5th Cir. 1995); Chicago Milwaukee Corp. v. U.S., 40 F.3d 373, 375 (Fed. Cir. 1994); Goulding v. U.S., 929 F.2d 329, (7th Cir. 1991), cert. denied, 506 U.S. 865, 113 S.Ct. 188 (1992); Curasi v. U.S., 907 F.Supp. 373 (M.D. Fla.1995). The lack of a timely filed refund claim deprives the district court of subject matter jurisdiction in suit for refund of taxes. Beckwith Realty, Inc. v. U.S., 896 F.2d 860 (4th Cir. 1990); Gustin v. U.S. I.R.S., 876 F.2d 485 (5th Cir. 1989); Beckman v. Battin, 926 F.Supp. 971 (D.Mont. 1995). Necessity for filing claim to recover taxes paid as prerequisite of suit is not dispensed with because claim may be rejected. United States v. Felt & Tarrant Mfg. Co., 283 U.S. 269, 51 S.Ct. 376 (1931); Bohn v. U. S., 467 F.2d 1278 (8th Cir. 1972).

b. 26 U.S.C. Section 6511 - Timely Filing of the Refund Claim.

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

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

---

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

"In absence of some indication to the contrary, the court must assume that the language of Section 322(b)(1) [I.R.C.1939 (now 26 USCA Section 6511)], prescribing the time for the making of claims for overpayments of income taxes and for other taxes erroneously or illegally assessed or collected, was intended to be given its ordinary meaning." Jones v. Liberty Glass Co., 332 U.S. 524, 68 S.Ct. 229 (1947). Periods of non claims limitations are established to cut off rights, justifiable or not, that might otherwise be asserted, and such periods of limitation must be strictly adhered to by the judiciary. Kavanagh v. Noble, 322 U.S. 535, 539 (1947). Like 215.26, Florida Statutes, the limitations period in 26 U.S.C. Section 6511, governing tax refund claims, is jurisdictional in nature and cannot be waived. Commissioner of Internal Revenue Lundy, __ U.S., at __, 116 S.Ct. 647, 651 (1996); Gabelman v. C.I.R., 86 F.3d 609 (6th Cir. 1996); Zeier v. U.S. I.R.S., 80 F.3d 1360 (9th Cir. 1996). Tax refund claims not filed within the non-claim limitations period cannot be maintained, regardless of whether tax is alleged to have been erroneously, illegally or wrongfully collected. U.S. v. Dalm, 494 U.S. 596, 110 S.Ct. 1361 (1990). See also Kreiger v. U. S., 539 F.2d 317 (3rd Cir. 1976).

Within the past year, the United States Supreme Court has decided two cases concerning the timely filing requirements under the Internal Revenue Code. The most recent decision was on February 18, 1997, when the United States Supreme Court decided the case of United States v. Brockamp, ___ U.S. ___ , 117 S.Ct. 849 (1997). The issue before the Supreme Court was somewhat similar to that faced by this Court in Victor Chemical - was there an exception from the clear statutory time limit in the refund statute. In Brockamp, the Supreme Court had to resolve a split in the circuit over the question of whether there existed an implied exception, called "equitable tolling," when the language of 26 U.S.C. Section 6511 did not expressly provide for such an exception. Brockamp, 117 S.Ct. at 850-51. The Supreme Court resolved the difference, in somewhat the same manner as this Court did in Victor Chemical, by ruling there was no such thing in 26 U.S.C. Section 6511 as "equitable tolling." The Supreme Court began

its discussion of Section 6511, and the express limit period by stating "§ 6511 sets forth its time limitations in unusually emphatic form." Brockamp, 117 S.Ct. 851. The Court continued on with its examination of Section 6511 and noted the many times that Congress set forth in "highly detailed technical manner." Id. In coming to the same conclusion of this Court that "where no exemption from the provision of a non-claim statute exists, a court is powerless to create one," the Supreme Court stated"

> To read an "equitable tolling" provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc. Moreover, such an interpretation would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery--a kind of tolling for which we have found no direct precedent. § 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.
>
> * * *
>
> 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.
>
> * * *
>
> At the least it tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.

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

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

Id. at 852.

The case of Commissioner of Internal Revenue v. Lundy, ___ U.S. ___, 116 S.Ct. 647

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

2. STATE TIME LIMITS AND REFUND CLAIMS.

In the past few years, especially in cases arising out of the United States Supreme Court's decision in Davis v. Michigan Department of Treasury, 489 U.S. 803, 109 S.Ct. 1500 (1989)[22/], states have been faced with class action refund suits from taxpayers. The majority of those taxpayers seeking a refund did not comply with the state's procedural refund statute, either not filing a written claim or not timely filing the claim. Consistently, the state courts have been holding that those taxpayers who individually did not follow the state's statutory refund procedures are barred from seeking a refund. And most importantly, the main issue on the merits in each of these cases was the unconstitutionality of the underlying state tax statute.

In Bailey v. State, 330 N.C. 227, 412 S.E.2d 295 (1991), there was a class of federal retirees seeking the Davis refunds. The North Carolina Supreme Court denied refunds. The court stated North Carolina law required individual timely compliance with the refund statute, stating

---

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

that "each member must individually satisfy the conditions precedent to suit mandated in [the refund] statute." Id. 412 S.E.2d at 301 n.3 See also Id. at 302, n.4. The supreme court denied the plaintiffs' refund action because they each had not complied with the conditions precedent to bringing suit against the department of revenue. The Supreme Court repeated its holding in Swanson v. State, 335 N.C. 674, 441 S.E.2d 537 (1994). This was another group of federal retirees. They too had not individually timely filed a refund request under North Carolina law. The court stated "[w]e conclude plaintiffs are procedurally barred from recovering in this action the refunds sought because they did not comply with the State's statutory postpayment refund demand procedure." Id. 441 S.E.2d at 540.[23]/

The list is nearly endless of the states who have strictly required compliance with the state's refund statutes. 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. Section 5884 - 3 year period to file a refund claim - filing mandatory]; Matteson v. Director of Revenue, 909 S.W.2d 356, 360 (Mo. 1995) [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) [Section 39-21-108(1), Colo. Stat. - mandatory filing or claim barred]; Atkins v. Department of Revenue 320 Or. 713, 894 P.2d 449, 454 (1995) [Or. Revenue Stat. Section 305.765 - refund statute addressing only invalidated taxes];

---

[23]/ 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.

Commonwealth of Kentucky v. Gossum, 887 S.W.2d 329, 334-335 (Ky. 1994) [Ky. Revenue Stat. Section 134.590 - refund statute addressing only tax statutes held to be invalid, 2 year limitation]. See also Stallings v. Oklahoma Tax Commission, 880 P.2d 912 (Okl. 1994); Swanson v. State, 335 N.C. 674, 441 S.E.2d 537 (1994) [24]/ ("[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. Section 42-124(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).

In McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), when Florida raised a concern that the payment of a refund of taxes to McKesson Corporation would undermine the State's ability to engage in sound fiscal planning, the United States Supreme Court, stated that Florida had the:

> freedom to impose various procedural requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State

---

[24]/ 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.

> might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing some other timely notice of complaint; execute any refunds on a reasonable installment basis; enforce relatively short statutes of limitations applicable to such actions; refrain from collecting taxes pursuant to a scheme that has been declared invalid by a court or other competent tribunal pending further review of such declaration on appeal; and/or place challenged tax payments into an escrow account or employ other accounting devices such that the State can predict with greater accuracy the availability of undisputed treasury funds. The 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.

McKesson, 496 U.S., at 44.

The timely filing requirements meet all the needs expressed so eloquently by the United States Supreme Court and the Third District Court of Appeal. By both directing how a refund is to be applied for and limiting the time in which to file, Section 215.26, Florida Statutes, protects the fiscal integrity of the State Treasury.

III. THE CLASS ACTION PROCEDURE CANNOT BE USED WHEN LEGISLATIVE "JURISDICTIONAL" STATUTES ARE INVOLVED WHEN TO SO PERMIT A CLASS ACTION WOULD DESTROY THE LEGISLATURE'S VERY "JURISDICTIONAL" INTENT AND PURPOSE; A COURT RULE DOES NOT OVERRIDE A CLEAR AND UNAMBIGUOUS LEGISLATIVE ENACTMENT.

The effect of the trial court certifying, and the First District affirming, a class action refund action in this particular case is that in applying Rule 1.220, Florida Rules of Civil Procedure, in total disregard of the mandated legislative remedies set forth in Section 215.26, Florida Statutes, the courts below have permitted a court rule to override a legislative substantive statute. This is contrary to law and the decisions of this Court.

Article V, Florida Constitution, grants to this Court certain enumerated powers. One of those powers is the authority to establish rules governing the procedure of courts. Boyd v. Becker, 627 So. 2d 481, 484 (Fla. 1993). However, the rule-making authority does not mean this Court can promulgate a rule of procedure that overrides, amends or abrogates a substantive law of the Legislature; this the Court has found on a number of occasions. Petition of Jacksonville

Bar, 125 Fla. 175, 169 So. 674, 675 (1936); Lundstrum v. Lyon, 86 So. 2d 771, 772 (Fla. 1956); State v. Garcia, 229 So. 2d 236, 238 (Fla. 1969); Boyd v. Becker, 627 So. 2d, at 484. Substantive rights conferred by law can neither be diminished nor enlarged by procedural rules adopted by this Court. State v. Furen, 118 So. 2d 6 (Fla.1960); Ramos v. State, 505 So. 2d 418, 421 (Fla. 1987).

This Court discussed the difference between "procedural" law and "substantive" law in State v. Garcia, supra, where this Court stated:

> Procedural law is sometimes referred to as 'adjective law' or 'law of remedy' or 'remedial law' and has been described as the legal machinery by which substantive law is made effective. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. See 52A C.J.S., Law, page 741; 20 Am.Jur.2d, Courts, s 84.

State v. Garcia, 229 So. 2d, at 238. See also Haven Federal Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991). Substantive law:

> includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property. Adams v. Wright, 403 So. 2d 391 (Fla.1981).

Haven Federal Sav. & Loan Ass'n v. Kirian, 579 So. 2d, at 732. And practice and procedure:

> "encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla.1972) (Adkins, J., concurring). It is the method of conducting litigation involving rights and corresponding defenses. Skinner v. City of Eustis, 147 Fla. 22, 2 So. 2d 116 (1941).

Haven Federal Sav. & Loan Ass'n v. Kirian, 579 So. 2d, at 732. As this Court stated in Benyard v. Wainwright, 322 So. 2d 473, 475 (Fla.1975), "Substantive law prescribes the duties and rights under our system of government.... Procedural law concerns the means and method to apply and enforce those duties and rights.".

The question next turns to whether Section 215.26, Florida Statutes, is to be classified as a legislative substantive statute, regulating the rights of taxpayers, or a court "procedural" statute

regulating the practice and procedure before the courts of this State. Based upon the interpretations given by this Court, Section 215.26, Florida Statutes, is a legislative "substantive" statute and not a procedural statute. Section 215. 26, Florida Statutes, regulates the rights of aggrieved taxpayers in the process of seeking a recovery of monies paid by the taxpayer into the State Treasury. As this Court held in Victor Chemical, Section 215.26, Florida Statutes, is a statute of nonclaim. This Court has already held that a statute delimiting the limitation period in which to file a suit is a "substantive" statute. Boyd v. Becker, 627 So. 2d 481 (Fla.1993), [holding that statutes of limitation provide substantive rights and thereby supersede procedural rules]; R.J.A. v. Foster, 603 So. 2d 1167, 1171-1172 (Fla. 1992) [w]hen a lawsuit must be filed is, in our view, substantive; how it is to be tried in an orderly manner is procedural."]; S.R. v. State, 346 So. 2d 1018 (Fla. 1977). While no court of this State has directly addressed nonclaim statutes like Section 215.26, Florida Statutes, if statutes of limitations are "substantive," so too are statutes of nonclaim, because statutes of nonclaim clearly determine when a tax lawsuit must be filed; **not** how the tax lawsuit is to be tried in an orderly manner.

Section 215.26, Florida Statutes, is not the Legislature's only substantive statute that controls various aspects of the rights and remedies of aggrieved taxpayers. The Legislature has set out in Chapter 72 and Chapter 194, Florida Statutes, specific requirements that must be followed by the taxpayer in order to obtain relief. In particular, Section 72.011 and Section 194.171, Florida Statutes, set forth payment and time requirements that must be met if the taxpayer is to proceed with judicial remedy.

The pertinent provisions of Section 72.011, Florida Statutes, are:

> (1)(a) A taxpayer may contest the legality of any assessment or denial of refund of tax, fee, surcharge, permit, interest, or penalty provided for under s. 125.0104, s. 125.0108, chapter 198, chapter 199, chapter 201, chapter 203, chapter 206, chapter 207, chapter 210, chapter 211, chapter 212, chapter 213, chapter 220, chapter 221, s. 370.07(3), chapter 376, s. 403.717, s. 403.718, s. 403.7185, s. 403.7195, s. 403.7197, s. 538.09, s. 538.25, chapter 550, chapter 561, chapter 562, chapter 563, chapter 564, chapter 565, chapter 624, or s. 681.117 by filing an action in circuit court; or, alternatively, the taxpayer may file a petition under the applicable provisions of chapter 120. However,

once an action has been initiated under s. 120.56, s. 120.565, s. 120.57, or s. 120.575, no action relating to the same subject matter may be filed by the taxpayer in circuit court, and judicial review shall be exclusively limited to appellate review pursuant to s. 120.68; and once an action has been initiated in circuit court, no action may be brought under chapter 120.

(b) A taxpayer may not file an action under paragraph (a) to contest an assessment or a denial of refund of any tax, fee, surcharge, permit, interest, or penalty relating to the statutes listed in paragraph (a) until the taxpayer complies with the applicable registration requirements contained in those statutes which apply to the tax for which the action is filed.

(2) No action may be brought to contest an assessment of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1) after 60 days from the date the assessment becomes final. No action may be brought to contest a denial of refund of any tax, interest, or penalty paid under a section or chapter specified in subsection (1) after 60 days from the date the denial becomes final. The Department of Revenue or, with respect to assessments or refund denials under chapter 207, the Department of Highway Safety and Motor Vehicles or, with respect to assessments or refund denials under chapters 210, 550, 561, 562, 563, 564, and 565, the Department of Business and Professional Regulation, shall establish by rule when an assessment or refund denial becomes final for purposes of this section and a procedure by which a taxpayer shall be notified of the assessment or refund denial. It is not necessary for the applicable department to file or docket any assessment or refund denial with the agency clerk in order for such assessment or refund denial to become final for purposes of an action initiated pursuant to this chapter or chapter 120.

(3) In any action filed in circuit court contesting the legality of any tax, interest, or penalty assessed under a section or chapter specified in subsection (1), the plaintiff must:

(a) Pay to the applicable department the amount of the tax, penalty, and accrued interest assessed by such department which is not being contested by the taxpayer; and either

(b)1. Tender into the registry of the court with the complaint the amount of the contested assessment complained of, including penalties and accrued interest, unless this requirement is waived in writing by the executive director of the applicable department; or

2. File with the complaint a cash bond or a surety bond for the amount of the contested assessment endorsed by a surety company authorized to do business in this state, or by any other security arrangement as may be approved by the court, and conditioned upon payment in full of the judgment, including the taxes, costs, penalties, and interest, unless this requirement is waived in writing by the executive director of the applicable department.

Failure to pay the uncontested amount as required in paragraph (a) shall result in the dismissal of the action and imposition of an additional penalty in the amount of 25 percent of the tax assessed. Provided, however, that if, at any point in the action, it is determined or discovered that a plaintiff, due to a good faith de minimis error, failed to comply with any of the requirements of paragraph (a) or paragraph (b), the plaintiff shall

be given a reasonable time within which to comply before the action is dismissed. For purposes of this subsection, there shall be a rebuttable presumption that if the error involves an amount equal to or less than 5 percent of the total assessment the error is de minimis and that if the error is more than 5 percent of the total assessment the error is not de minimis.

(4)(a) Except as provided in paragraph (b) of this subsection, an action initiated in circuit court pursuant to subsection (1) shall be filed in the Second Judicial Circuit Court in and for Leon County or in the circuit court in the county where the taxpayer resides or maintains its principal commercial domicile in this state.

(b) Venue in an action initiated in circuit court pursuant to subsection (1) by a taxpayer that is not a resident of this state or that does not maintain a commercial domicile in this state shall be in Leon County. Venue in an action contesting the legality of an assessment or refund denial arising under chapter 198 shall be in the circuit court having jurisdiction over the administration of the estate.

(5) The requirements of this section are jurisdictional.

Thus, if a taxpayer wishes to contest all or any part of an assessment or denial of a refund a taxpayer must file the appropriate action pursuant to Chapter 72, Florida Statutes, or Section 120.575, Florida Statutes, within the time specified in Section 72.011(2), Florida Statutes.

Two very specific substantive factors in Section 72.011, Florida Statutes, are determinative of a taxpayer's right to proceed to circuit court. First, a challenge must be brought within 60 days of the final assessment or denial of a refund and, second, the failure to so bring a challenge within 60 days is "jurisdictional."[25]/ The failure to file a challenge to an assessment in a circuit court within the specified time period makes the agency action "final" and then bars a circuit court from hearing any contest to the assessment.

The provisions of Section 72.011, Florida Statutes, have never been before this Court before. However, the district courts have examined various provisions of Section 72.011, Florida Statutes. Last year the First District Court visited Section 72.011(2), Florida Statutes, and the meaning of the 60 day filing requirement. State, Department of Revenue v. Ray Construction of

---

[25]/ An additional important factor in a challenge to an assessment in circuit court is subsection (4) which requires the payment of the contested tax or some arrangement to ensure payment should the taxpayer lose the case.

Okaloosa County, 667 So. 2d 859 (Fla. 1st DCA 1996). In that case, Ray Construction brought a declaratory judgment action to both contest four (4) "final" assessments of documentary stamp tax and have the court rule on the future applicability of Chapter 201, Florida Statutes, on Ray Construction's activities. However, Ray Construction failed to bring the challenge to the four (4) assessments within 60 days of the assessments becoming final.[26]/ Beginning with a statement of Section 72.011(2), Florida Statutes, the First District stated:

> Under the provisions of this statute a taxpayer has 60 days from the date an assessment becomes final within which to file a petition for administrative proceedings pursuant to chapter 120, Florida Statutes, or to file a complaint in the circuit court.

Ray Construction, 667 So. 2d at 861.

In the case of Department of Revenue v. Rudd, 545 So. 2d 369, 371 (Fla. 1st DCA 1989), a case concerning a failure to challenge a tax warrant within 60 days, the First District stated:

> Section 72.011, Florida Statutes, and companion predecessor statutes have long imposed a requirement that the taxpayer shall begin contest proceedings within a specified time after the assessment becomes final, and also a requirement that prior to challenge the taxpayer shall pay any portion admittedly owed.

The First District has further stated that the "requirements of Section 72.011(2), Florida Statutes, are jurisdictional, and therefore, failure to comply precludes the circuit court from entertaining jurisdiction over the matter.[27]/ Ray Construction, 667 So. 2d, at 861, citing Department of Revenue v. Nu-Life Health and Fitness Center, 623 So. 2d 747, 752 (Fla. 1st DCA 1992). Based upon the facts that the case was brought after the 60 day period, the First

---

[26]/ An additional important fact to note from Ray Construction was the fact that after the four (4) assessments became final, Ray paid the four (4) assessments and then sought a refund of the monies paid. The District Court specifically reversed the trial court's refund ruling stating: "We reverse, as to that portion of the final judgment invalidating the four assessments and ordering a refund to Ray Construction, because the challenge to these assessments was untimely." Ray Construction, 667 So. 2d at 865.

[27]/ The First District also made it clear that the 60 day period applies to all tax cases and the form of action, such as a declaratory judgment action brought under Chapter 86, Florida Statutes, does not alter the time period limitation. Ray Construction, 667 So. 2d, at 863.

District ordered that the challenge to the four (4) assessments be dismissed.[28]/

The district courts have been consistent in ruling that failure to meet all the of the many "jurisdictional" requirements of Section 72.011, Florida Statutes, bars the action and thus prevents a trial court from entertaining a challenge to the underlying assessment, refund or taxing statute. See Department of Revenue v. Nu-Life Health and Fitness Center, supra (failure to make security arrangements); Hirsh v. Crews, 494 So. 2d 260 (Fla. 1st DCA 1986); and, Mirabal v. Dept. of Revenue, 553 So. 2d 1297 (Fla. 3rd DCA 1989)(failure to make security arrangements).

Section 72,011, Florida Statutes, concerns state excise taxes. A similar statute, Section 194.171, Florida Statutes, addresses tax challenges to local ad valorem taxation. In particular, Section 194.171 (2), Florida Statutes, states:

> 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), or after 60 days from the date a decision is rendered concerning such assessment by the value adjustment board if a petition contesting the assessment had not received final action by the value adjustment board prior to extension of the roll under s. 197.323.

Since Section 194.171, Florida Statutes, and Section 72.011, Florida Statutes, are nearly identical in language, the courts have issued consistent ruling about the end effect of the jurisdictional requirements of those laws. This Court interpreted Section 194.171, Florida Statutes, in Bystrom v. Diaz, 514 So. 2d 1072 (Fla. 1987), by examining the effect that the jurisdictional requirements of subsection (6) had on a case where either subsections (2), (3) or (5) were not met.[29]/ While noting that the law appeared to be "somewhat harsh," this Court upheld

---

[28]/ Ironically, the First District affirmed the trial court's ruling that the method of assessments by the Department of Revenue, including the four (4) that were dismissed as untimely, was incorrect. Therefore, had Ray Construction "timely" challenged the four (4) dismissed assessments those assessments would also have been reversed. Ray Construction, 667 So. 2d at 864-65.

[29]/ In that case, subsection (5) was involved, because after initiating the action, the taxpayer did not continue in later years to make his good faith payments. Id.

the Legislature's substantive law by stating that "its meaning was clear." Id., 514 So. 2d, at 1074. Where the tax was not paid, the case was to be dismissed. Id., 514 So.2d, at 1075. This Court expressly found that the legislature intended for the law to be jurisdictional and did not find this to be a denial of access to courts as the time period was a reasonable restriction. Id. Since the law only required a timely challenge and the payment of undisputed taxes, the law did not deny access to the court. Id. Finally there was no denial of due process. Id.

This Court next examined the 60 day time period in the case of Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814 (Fla. 1988). In that case, the taxpayers did not contest an assessment, certified on Oct. 19, 1983, until March 1, 1984, more than 60 days later. The trial court dismissed the action under Sections 194.171(2) and (6), Florida Statutes. The district court of appeal reversed the dismissal. Id. This Court reversed the district court finding that Section 194.171(6), Florida Statutes, prevented the trial court from exercising jurisdiction over the case when the 60 day time period in Section 194.171(2), Florida Statutes, was not met. Markham, 527 So. 2d at 816.

Florida's district courts have also ruled that the failure to comply with subsections (2), (3) and (5), of Section 194.171, Florida Statutes, are "jurisdictional." Davis v. Macedonia Housing Authority, 641 So. 2d 131 (Fla. 1st DCA 1994)[denial of tax exemption is part of tax assessment to which the time limits of Section 194.171, Florida Statutes, apply]; Hirsh v. Crews, 494 So. 2d 260 (Fla. 1st DCA 1986); Hall v. Leesburg Regional Medical Center, 651 So. 2d 231 (Fla. 5th DCA 1995)[The 60 day period in which to file a suit under Section 194.171, Florida Statutes, is jurisdictional]; State, Department of Revenue v. Stafford, 646 So. 2d 803 (Fla. 4th DCA 1994) [same]; Wilkinson v. Reese, 540 So. 2d 141 (Fla. 2nd DCA 1989)(failure to make good faith payment at time of suit is jurisdictional; "relation back" doctrine does not apply where requirements are jurisdictional); Clark v. Cook, 481 So. 2d 929 (Fla. 4th DCA 1986); Department of Revenue v. Rudd, supra, (failure to challenge tax warrant within 60 days).

Because the Legislature, through the enactment of Florida Statutes, contemplates a taxpayer by taxpayer analysis of both excise and ad valorem tax assessments by each of the affected taxpayers, there can be, as a matter of law, no class action to challenge ad valorem or excise tax assessments or denials of tax refunds. Under the legal schemes devised by the Florida Legislature, the only way to challenge an alleged invalid ad valorem tax assessment, excise tax assessment, or the denial of a refund is through either Section 72.011, Section 215.26, or Section 194.171, Florida Statutes, as they may apply.

The problem faced by the Respondents in this case have been addressed before in an ad valorem tax case. Hirsh v. Crews, 494 So. 2d 260 (Fla. 1st DCA 1986). The Hirshs were residents of Columbia County and owners of single family residential property. The proposed class was to be comprised of all Columbia County taxpayers whose single family residential property was allegedly reassessed on the 1984 Columbia County real property tax roll at a higher level than all other single family residential property in Columbia County. The Hirshs disagreed with the assessment process. The Hirshs filed, on behalf of themselves and all others similarly situated, a class action complaint pursuant to Rule 1.220, Florida Rules of Civil Procedure, claiming unconstitutional and discriminatory reassessment of their property on the 1984 county tax roll. The Hirshs sought to act as representative plaintiffs to challenge tax assessments. In particular, the Hirshs claimed that their filing, within the 60-day claims period provided under section 194.171(2), Florida Statutes, commenced the action for all members of the purported class.

The trial court denied the request for a class action and dismissed the case. The First District Court of Appeal first held that "Section 194.171(2) [Florida Statutes], as amended, has been construed to be a statute of nonclaim acting as an absolute bar to any suit filed after the 60 day time limit. Gulfside Vacations Inc. v. Schultz, 479 So. 2d 776 (Fla. 2d DCA 1985). We find that construction to be correct and controlling." Hirsh v. Crews, 494 So. 2d, at 261-262.

Because Section 194.171, Florida Statutes, is a statute of nonclaim and "jurisdictional," each and every taxpayer had to comply with the provisions of the act to contest an ad valorem tax assessment. Thus, the First District concluded:

> Because section 194.171 is jurisdictional, payment of taxes owed by the representative plaintiffs alone, filing of their tax receipt, and filing of an action within the 60 day limit as a class action, would not satisfy the requirements of the statute as to the other members of the class. Under the statute as amended, the trial court had no power or authority to determine the rights of taxpayers who did not meet the requirements of section 194.171.

Id., at 262.[30]/

The differences between this case and Hirsh are nonexistent. What the Respondents here have attempted to do, and the lower courts have permitted, is to proceed with a class action refund case by paying the assessment under Section 395.7015(2)(a), Florida Statutes, and then representing all persons subject to the same assessment without those class members having satisfied any of the requirements of Section 215.26, Florida Statutes. As the trial court in Hirsh had no power or authority to determine the rights of taxpayers who did not meet the requirements of Section 194.171, Florida Statutes, the courts below did not have power or authority to determine the rights of taxpayers to a refund who did not meet the requirements of Section 215.26, Florida Statutes.

---

[30]/ Respondents incorrectly rely on State ex rel. Devlin v. Dickinson, 305 So. 2d 848 (Fla. 1st DCA 1974). This case stands for the proposition that a court should only certify a class where all the class was composed of members who had each complied with the "procedural" refund statute, Section 215.16, Florida Statutes.

CONCLUSION

This Court should quash the First District's decision in this matter by reaffirming its holding in State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954). This Court should reaffirm that one who seeks a refund of monies paid into the state treasury must make a timely claim for a refund as provided in section 215.26, Florida Statutes, or be forever barred.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 337609
OFFICE OF THE ATTORNEY GENERAL
The Capitol-Tax Section
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 488-5865 FAX

Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to: MURRAY B. SILVERSTEIN, Esquire, Powell, Carney, Hayes & Silverstein, Post Office Box 1689, St. Petersburg, Florida 33731-1689; and CYNTHIA A. MIKOS, Esquire, Holland & Knight, 510 Vonderburg Drive, Suite 3005, Brandon, Florida, this 7th day of November, 1997.

ERIC J. TAYLOR

F:\USERS\TAX\ERIC\HAMEROFF\FSC\INITIAL2.WPD