IN THE SUPREME COURT OF FLORIDA

PUBLIC MEDICAL ASSISTANCE TRUST FUND; AGENCY FOR HEALTH CARE ADMINISTRATION and **DOUGLAS M. COOK**, in his official capacity as the Director of the Agency For Health Care Administration,

Petitioners,

vs.

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

Respondents.
_____/

FILED
SID J. WHITE
APR 23 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

Case No. 90,326

PETITIONERS' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

This petition involves the same issues as those presented in Nemeth v. Department of Revenue, 22 Fla. Law Weekly D249a (Fla. 4th DCA January 22, 1997), pending review, Case No. 89,909, Florida Supreme Court. In this case, the Petitioners are the State of Florida, Agency for Health Care Administration, (hereafter referred to as "AHCA") and Douglas M. Cook, in his official capacity as director of AHCA, which administers the Public Medical Assistance Trust Fund, (hereafter referred to as "PMAFT"). Collectively they will be referred to as "Petitioners." Respondents are certain health care entities, consisting of an individual physician, Nathan M. Hameroff, M.D., and several professional service corporations, Gateway Radiology Consultants, P.A., (hereafter "Gateway"), Bay Area Heart Center, P.A., (hereafter "Bay Area"), Cardiologist Specialists, P.A., and Cardiovascular Associates, Inc. Each health care entity comprises a group practice of physicians. Collectively they will be referred to as "Respondents" or "Hameroff."

STATEMENT OF THE CASE AND OF THE FACTS

Section 395.7015, Fla. Stat., imposes an tax of 1.5% on the annual revenues of certain health care entities. The monies collected are deposited in the PMAFT. Respondents are, or believe they are, health care entities required to pay the tax under § 395.7015, Fla. Stat. Respondents Bay Area and Gateway have paid the tax. Bay Area filed a refund request with AHCA, as required by § 215. 26, Fla. Stat., but only **after** the initiation of this case. However, AHCA has yet to decide on the refund request. While Respondent Gateway paid its tax, it did so more than three years ago and has never filed a refund request pursuant to § 215.26 with AHCA.

COURSE OF THE PROCEEDINGS BELOW

Respondents brought this action in the Second Judicial Circuit Court (hereafter "Circuit Court") challenging the assessment of a 1.5% tax on their annual revenues required by § 395.7015, Fla. Stat. Respondents seek to have § 395.7015 declared unconstitutional, to prohibit

future assessments and collections of the tax, and to receive a refund of taxes paid.[1]/ Complaint. Appendix I. In part, Respondents seek judicially ordered refund of the monies paid to AHCA under § 395.7015, Fla. Stat.

Respondents brought this case as a class action to include all health care entities subject to the tax under § 395.7015, Fla. Stat., including both those who have paid the tax and those who have not paid the tax. Respondents moved to have their case certified as a class action (Motion, Appendix II) including both types of Respondents. The Petitioners opposed the motion. (Appendix III) The Circuit Court entered an order that certified the case as a class action on May 2, 1996. (Order, Appendix IV). The certified class, in practical reality, consists of three distinct subclasses:

1) those members who have not paid the assessment;
2) those members who have paid the assessment and who have not yet individually complied with § 215.26 Fla. Stat.; and
3) those members who have paid the assessment, did not yet individually comply with § 215.26 Fla. Stat., and are now beyond the time period in § 215.26(2), Fla. Stat., and **can never** comply with the statute of non-claim.

Of the 4 class leaders of the certified class, two class representatives have not paid the tax at all; one has paid the tax but has not filed for a refund in compliance with § 215.26, Fla. Stat., 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. The Petitioners timely appealed the order on class certification to the First District Court of Appeal.

On February 18, 1997, the First District issued it ruling in Public Medical Assistance Trust Fund v. Hameroff, 22 Fla. Law Weekly D497d (Fla. 1st DCA February 18, 1997). (Appendix V) On February 28, 1997, the Petitioners moved the First District for clarification,

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[1]/ 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 collections of taxes and to stop future assessments by the Petitioners. The declaratory action is **not** challenged by this appeal and the class certified as to the declaratory action is not objected to by the Petitioners.

rehearing and rehearing en banc. (Appendix VI). The Petitioners asserted the following reasons why the First District should reconsider its decision:

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 § 215.26, Fla. Stat.. 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.[2/]

Rehearing The [District] 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 § 215.26(2), Fla. Stat., 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 [the District] Court. A panel may not overrule or reverse decisions of the court that may be done solely by the court sitting *en banc*.

On March 27, 1997, the First District denied clarification, rehearing and rehearing en banc. (Appendix VII). The Petitioners timely filed their Notice to Invoke Discretionary Jurisdiction of this Court, pursuant to Fla. R. App. P. 9.030(a)(2)(iv) and (v), on April 14, 1997. (Appendix VIII)

STATEMENT OF THE ISSUES

Whether a circuit court has jurisdiction in a case when a party seeking a refund of monies held in the State Treasury:

a. Has not filed an application for a refund of monies held in the State Treasury, as required by and in accordance with, § 215.26, Fla. Stat.?; and/or

b. Did not file a request for a refund within the time period specified in § 215.26(2), Fla. Stat.?

[2/] What constitutes "constitutionally-based" is not clear. For example, is the exception limited to cases where the **only** ground is facial constitutionality?; unconstitutional as applied? What if the case consists of grounds for a refund, not only that the law or rule is unconstitutional, but also grounds that the Comptroller can order a refund without ever reaching the constitutional issue?

SUMMARY OF THE ARGUMENT

This Court should exercise its discretion to resolve the conflict between the decisions of the Fourth, First and Third District Courts of Appeal in their conflicting interpretations of Kuhnlein, infra, and Victor Chemical, infra. The Court should further accept jurisdiction in this case because the issues appealed by the Petitioners to the District Court are the exact same issues presently pending before this Court in Nemeth.

The Legislature with the passage of § 215.26, Fla. Stat., established two elements that must be met in order to obtain a refund of taxes paid into the State Treasury. The first element is that the taxpayer must file a claim for refund with the Comptroller. This Court has upheld the mandatory filing requirement. See Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295 (Fla. 1967); State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954).

The second element is conditional of the first, in that the claim for refund must be filed within a 3 year period after the payment of tax. This Court has recognized the filing limitation in § 215.26, Fla. Stat., as being a statute of nonclaim. Victor Chemical. Such a time requirement to limit exposure to refund claims has been sanctioned by the United States Supreme Court in McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990).

Like in the cases of Nemeth and Westring v. State, Department of Revenue, 682 So. 2d 171 (Fla. 3d DCA 1996), no taxpayer in the instant case, has filed a refund claim prior to initiation of the lawsuit. Like Nemeth, one of the respondents paid the assessment more than three years before the initiation of the suit. The First District is interpreting Kuhnlein as "creating [a general] exception to the general rule established in State ex rel. Devlin v. Dickinson, 305 So.2d 848 (Fla. 1st DCA 1975), and similar cases, which requires a party to first

seek and be denied a refund before filing suit for a tax refund." (Appendix F, p. 4).[3]/ Both the Fourth District in Nemeth and the First District in Hameroff, have failed to directly address the question of whether the 3 year time period to file for a refund is still valid and what time period is to apply to the plaintiffs in those cases who were clearly beyond the 3 year period, even though this issue was squarely before them.

The conflict arises between Nemeth, Westring, and Hameroff, in the application of this Court's decision of Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), to the refund actions before those courts.

In Kuhnlein this Court addressed whether or not, under the particular factual circumstances present there, a person who paid the impact fee had to first file a claim for refund with the Comptroller or could that taxpayer go directly to circuit court. Under the facts of that case, this Court allowed those who paid the impact fee could go directly to circuit court.

However, this Court did **not** decided or have before it in Kuhnlein a number of issues. First, this Court did not declare § 215.26, Fla. Stat., invalid in any manner nor did this Court recede from Reynolds, Victor Chemical, or any other decision of this Court concerning § 215.26, Fla. Stat. Second, this Court did not, as implied by the First District in the instant case, create a "general exception" from the Legislature's requirements of § 215.26, Fla. Stat. Finally, this Court did not have before it in Kuhnlein the second element of the refund process; whether or not the filing of the refund claim, whether with the Comptroller or with the circuit court, must be made within the statute of nonclaim of three years as provided in § 215.26, Fla. Stat.

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[3]/ The First District's ruling in Hameroff implicitly overrules portions, if not all, of all its other decisions where it ruled that both compliance with § 215.26 was "mandatory" and such mandatory compliance be "timely." See Florida Livestock Board v. Hygrade Food Products Corporation, 145 So. 2d 535 (Fla. 1st DCA 1962); Grunwald v. Department of Revenue, 343 So. 2d 973 (Fla. 1st DCA 1977); Exxon Corporation v. Lewis, 371 So. 2d 129 (Fla. 1st DCA 1978); Medley Investors, Ltd. v. Lewis, 465 So. 2d 1305 (Fla. 1st DCA 1985); and Hirsh v. Crews, 494 So. 2d 260 (Fla. 1st DCA 1986).

The various lower courts have interpreted this Court's holding in Kuhnlein, concerning where to file an action in a challenge to a taxing statute as being facially unconstitutional, and have expanded it to include all challenges to any and all impositions of taxes, irrespective of whether or not the statute was facially unconstitutional. Furthermore, the lower courts have held that such a challenge can be brought any time irrespective of the three or five year statute of nonclaim contained in § 215.26, Fla. Stat.

ARGUMENT

I. THIS COURT SHOULD ACCEPT JURISDICTION, IN ORDER TO IMMEDIATELY RESOLVE THE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISIONS OF THE DISTRICT COURTS OF APPEAL AND THIS COURT'S DECISIONS IN KUHNLEIN, AND VICTOR CHEMICAL.

This Court has consistently, and without exception until 1994, ruled that a refund claim must be filed in accordance with the provisions of § 215.26, Fla. Stat., and that such a refund claim must be filed within the time specified by the Legislature in § 215.26(2), Fla. Stat. See, e.g. Reynolds Fasteners, Inc. v. Wright, 197 So. 2d 295 (Fla. 1967); State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954)[a case involving an unconstitutional statute]; and, State, ex rel. Tampa Electric Company v. Gay, 40 So. 2d 225 (Fla. 1949).

In 1994, this Court decided Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). There, this Court seemed to imply that the requirement of filing a refund claim under § 215.26, Fla. Stat., was no longer necessary in those cases where the challenged tax statute was facially unconstitutional under the federal constitution.[4]/ See e.g., Hameroff, 22 Fla. Law Weekly at D497d, explaining Kuhnlein decision.[5]/

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[4]/ Not before the Court in Kuhnlein was the question of the "timely" filing requirement of § 215.26(2), Fla. Stat., since the Kuhnlein class plaintiffs brought the action shortly after paying the fee.

[5]/ The Petitioners do not concur with the result of the First District's Hameroff decision but cite the decision as evidence of the confusion created in the wake of this Court's decision in Kuhnlein.

On October 2, 1997, the Third District Court of Appeal decided the case of Westring. In that case the Third District upheld the mandatory filing requirements of § 215.26, Fla. Stat., and affirmed the dismissal of Mr. Westring's claim under the authority of this Court's decision of Victor Chemical.[6/] In Nemeth, however, the Fourth District reversed the decision of the circuit court, finding that the case appeared to be controlled by this Court's decision in Kuhnlein. Nemeth v. Department of Revenue, 22 Fla. Law Weekly, at D249a. In Nemeth, the Fourth District expressed doubt as to whether, and to what extent, the Kuhnlein decision overturned or receded from earlier decisions of this Court, particularly Victor Chemical Works. The Fourth District considered immediately resolving these doubts to be an issue of great public importance. For this reason, the Fourth District certified the following question to this Court:

> WHETHER DEPARTMENT OF REVENUE v. KUHNLEIN, 646 So. 2d 717 (Fla. 1994) OVERRULED OR RECEDED FROM STATE EX REL. VICTOR CHEMICAL WORKS v. GAY, 74 So. 2d 560 (Fla. 1954) TO THE EXTENT THAT VICTOR CHEMICAL HOLDS THAT THE RIGHT TO A REFUND OF TAXES IS BARRED IF THE TAXPAYER FAILS TO MAKE A TIMELY CLAIM FOR REFUND AS PROVIDED IN § 215.26, Fla. Stat.?

While delaying the decision on jurisdiction in the matter, this Court ordered a briefing schedule on the merits of the case on February 24, 1997. Nemeth, Case No. 89,909.

The First District, in its interpretation of Kuhnlein and its effect on § 215.26, Fla. Stat., stated:

> In Kuhnlein, as here, the state contended that the class action was barred because none of the class representatives had applied for a refund pursuant to sections 215.26 and 26.012(2)(e). Kuhnlein, 646 So. 2d at 721. The supreme court expressly rejected this argument:
>
> > We . . . do not believe there is any requirement that the plaintiff must pay the fee or request a refund, at least in the present case. The fact that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax is sufficient to create standing under Florida law.
>
> * * *

[6/] Westring contains the same issues as in this case. Westring was cited as supplemental authority to the First District but that court failed to either discuss or even acknowledge the existence of the decision.

> The State . . . argues that the cause below was barred by the state's sovereign immunity, by an alleged common law rule that no one is entitled to the refund of an illegal tax, and by the requirements of Florida refund statutes. Even if true, these are is not proper reasons to bar a claim based on constitutional concerns. Sovereign immunity does not exempt the State from a challenge based on violation of the federal or state constitutions, because any other rule self-evidently would make constitutional law subservient to the State's will. Moreover, neither the common law nor a state statute can supersede a provision of the federal or state constitutions.
>
> We are also unpersuaded by the State's claim that a refund claim cannot be cast as a class action. Any constitutional claim affecting a class of persons can be the proper subject of a class action, provided other procedural requirements are met, as they were here.

Id. at 720, 721 (emphasis in original).

> We read Kuhnlein as creating an exception to the general rule established by Devlin v. Dickinson, 305 So. 2d 848 (Fla. 1st DCA 1975), and similar cases, which requires a party to first seek and be denied a refund before filing suit for a tax refund.

Hameroff 22 Fla. Law Weekly, at D497d.

As the Fourth District realized, there is a clear conflict between this Court's decision in Kuhnlein and its decision Victor Chemical. All three decisions involved the constitutionality of Florida Statutes. Yet, this Court in Victor Chemical, and in later decisions, like the United States Supreme Court, has always insisted that the statute of nonclaim requirements be timely met, even where the statute itself had been held unconstitutional.[7/] The Fourth District correctly noted that a conflict was apparent and correctly certified that the issue as one of great public importance. The issue is important because taxes and fees are continuously challenged on a variety of constitutional grounds. If taxes and fees can be ordered to be refunded by a court, beyond three years of their payment, what is to prevent a refund, in some other case, going back fifty years or

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[7/] In McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 45, n. 28, (1990), the Supreme Court noted its prior approval of time bars, such as § 215.26(2), Fla. Stat., the three year nonclaim bar, where refunds of unconstitutionally collected taxes are not timely sought.

more, based on a constitutional argument never before raised?[8]/

This Court should exercise its discretion and accept this case, to resolve the conflict between its Kuhnlein decision and its decision in Victor Chemical. The Victor Chemical decision remains consistent with recent United States Supreme Court precedent and should not be overturned or limited by mere implication, particularly without careful review and deliberation.

There is no greater attribute of sovereignty that a State's ability to collect taxes and fees to fund operations and to serve the needs of its citizens. Recognizing this fundamental proposition, the United States Supreme Court has upheld both the statutory requirement ro file for a refund and to time limitations on the filing of refund claims, even where the underlying statute has been declared unconstitutional. To the extent that Kuhnlein casts doubt on what has long been accepted, the resolution of this doubt is of great public importance.

This Court should act to resolve all doubts and conflicts and provide guidance on this critical issue.

CONCLUSION

This Court should accept jurisdiction of this matter, in order to resolve express and direct conflict between Kuhnlein and Victor Chemical, to resolve the conflicts between Westring, Nemeth, and Hameroff concerning Section 215.26, Florida Statutes, and provide guidance to the many courts that have these same issues pending before them.

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[8]/ Moreover, even routine statutory construction arguments can be recharacterized as constitutional claims. For example, if a taxing authority's interpretation of a statute is deemed erroneous, a taxpayer could allege that the authority denied the taxpayer "due process." If the applicability of time bars can be so easily avoided, then, the State's treasury is in grave jeopardy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to: MURRAY B. SILVERSTEIN, Esquire, Powell, Carney, Hayes & Silverstein, Post Office Box 1689, St. Petersburg, Florida 33731-1689; and CYNTHIA A. MIKOS, Esquire, Jacobs, Forlizzo & Neal, 13577 Feather Sound Drive, Suite 300, Clearwater, Florida 34622-5547, this 21st day of April, 1997.

ERIC J. TAYLOR