O/A 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' REPLY BRIEF

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ARGUMENT

Respondents are quite wrong in extending an invitation to this to Court drastically alter the past 50 year practice of tax refunds and overrule its bedrock decision in State ex rel. Victor Chemical v. Gay, 74 So. 2d 560 (Fla. 1954), together with all the decisions based upon Victor Chemical. This Court should decline Respondents' invitation. Victor Chemical is a well-reasoned interpretation of Sec. 215.26, Fla. Stat., which has stood the test of time.[1/] The policy behind the Legislature establishing the statute of nonclaim in Sec. 215.26, Fla. Stat., is to secure the State's interest in stable fiscal planning. For the Court to invade this legislative function would undermine the State's ability to engage in sound fiscal planning. The procedures set forth in Sec. 215.26, Fla. Stat., are proper and constitutional. McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18, 44 (1990).

Nothing Respondents present supports a reversal of Victor Chemical. To the contrary, their call for reversal will place this State out of step with the jurisdictions of the other states and contrary to the decisions of the United States Supreme Court over nearly identical Internal Revenue Code provisions. This will be the first state to ignore its legislature's express refund mandates and set a course on case-by-case judicial interpretation of when and how a refund may be authorized. Instead of long held legislative procedure, Florida will embark on a voyage of refund uncertainty for both the taxpayers and the agencies of the State.

Instead of overruling that decision and presenting an entirely unsupported interpretation of Sec. 215.26, Fla. Stat., this Court should use the opportunity offered by 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, Miami Tiresoles, Inc. v. Department of Revenue, __ So. 2d __ (Fla. 3rd DCA 1997), review granted, Case No. 91,055, Florida Supreme Court, and the

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[1/] An interpretation that has been implicitly approved by the United States Supreme Court in McKesson where the Supreme Court cited Sec. 215.26, Fla. Stat., as an example of a refund statute so written to protect the fiscal integrity of the State.

instant case to reaffirm Victor Chemical and the meaning and procedure that the Legislature has set forth in Sec. 215.26, Fla. Stat.

I. SEC. 215.26, FLA. STAT., IS A LEGISLATIVE MANDATE TO BE COMPLIED WITH PRIOR TO THE INITIATION OF A SUIT.

A. Sec. 215.26 Fla. Stat. is Jurisdictional

Respondents make a number of assertions in an attempt to avoid the fact that Sec. 215.26, Fla. Stat., is "jurisdictional." None of the Respondents' assertions have substance.

The Respondents were assessed a fee under the Public Medical Assistance Trust Fund (PMATF). Respondents argue that they do not know how to challenge a PMATF assessment issued to them pursuant to Sec. 395.0715, Fla. Stat. Considering their own citation to Sec. 26.012(2)(e), Fla. Stat., in paragraph 2 of their Complaint, their argument is unremarkable. That section gives to the circuit courts jurisdiction to hear **any** tax assessment.[2/] Respondents are free to bring an action under Chapter 86, Fla. Stat., and, that is in fact just what they did in this case.

While it is true that Sec. 72.011, Fla. Stat., is limited to certain taxes to which the PMAFT is not included. But then neither are the taxes and fees under the administration of the Department of Highway Safety and Motor Vehicles (particularly Chapters 319 and 320, Fla. Stat.) and the Department of Environmental Protection. That fact does not make anything special about a challenge to a PMAFT assessment. Be that is it may, one must first comply with Sec. 215.26, Fla. Stat., if one is seeking a refund of taxes paid to the State.

Respondents take solace in the fact the word "jurisdictional" does not appear in Sec. 215.26, Fla. Stat. However, there are more ways that just using the word "jurisdictional" to reflect the intent of the Legislature that an express, specific, required procedure is in fact

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[2/] While citing to Sec. 26.012(2)(e), Fla. Stat., as their grounds for jurisdiction to hear a tax assessment, the Appellees chose to ignore the remainder of Sec. 26.012(2)(e), Fla. Stat., which requires a "denial" of a refund claim for jurisdiction to lie in a circuit court. This is curious considering the Respondents are seeking a refund in their Complaint without filing a refund claim with the State.

"jurisdictional." There is no such jurisdictional language in the state tort statute, Sec. 768.28, Fla. Stat., yet this Court has long recognized that the specified procedure in Sec. 768.28, Fla. Stat, is not an administrative remedy, but a required legislative procedure that must be met before proceeding to court. Likewise, this Court has recognized the same in Sec. 215.26, Fla. Stat.

From such language in Sec. 215.26, Fla. Stat., as "shall file" and "forever barred" it is not at all hard to see the Legislature meant what it said - file a written claim with the Comptroller or your claim will be forever barred. This is clearly not administrative niceties. This is legislative mandated procedures. While the Legislature has not used the exact words desired by the Respondents this does not make the words used in Sec. 215.26, Fla. stat., any less "jurisdictional."

Respondents have not been forthright with this Court's, and the other District Courts', wording on the requirement to comply with the Legislature's express requirements contained in Sec. 215.26, Fla. Stat. First, the Respondents totally ignored key portions of Victor Chemical, in which this Court stated:

> *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. 74 So. 2d, at 562. This Court would not have made such a statement had it not recognized that the Legislature had, in fact, placed certain, specific, "conditions" within Sec. 215.26, Fla. Stat., before a refund was to be granted or denied. Contrary to the urging of the Respondents, nothing has changed since that decision to conclude that the Legislature meant anything else.

Next, in their effort to mask the importance of the decision of Reynolds Fasteners, Inc., v. Wright, 197 So. 2d 295 (Fla. 1967), the Respondents highlight a portion of a paragraph but de-emphasize another phrase in the same paragraph without telling the Court why their interpretation is not out of context to the uncited phrase or the underlying reasoning of the case.

In Reynolds Fasteners this Court 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.

Id., 197 So. 2d, at 297.

Respondents chose to emphasize the words "administrative remedies" used by the Court yet, at the same time, passed over the words "necessity to comply" in the same sentence. The phrase "necessity to comply" tells what the taxpayer is to do; the phrase "administrative remedy" is what is to be complied with. However, as this Court found in Reynolds Fasteners, those "administrative remedies" are Legislature created and mandated; they are not judicially discretionary terms.

Respondents seek to minimize the reason Reynolds Fasteners was before this Court. That case was before this Court because there was a conflict between the First and Third Districts over the "need to comply" with the Legislature's language contained in Sec. 215.26, Fla. Stat., before proceeding to court. The Third District had 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., 114 So. 2d 333 (Fla. 3rd DCA 1959). The First District Court of Appeal faced the same issue in Florida Livestock Board v. Hygrade Food Products Corporation, 145 So. 2d 535 (Fla. 1st DCA 1962). In that case, the Florida Livestock Board, a state agency, took the position that Section 215.26, and the statute's procedures, controlled Hygrade's right to refund relief. Id., 145 So. 2d at 536. 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 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.'

It was within this context that the Court concluded in Reynolds Fasteners. This Court was not concerned with the labels attached to the Legislature's requirements in Sec. 215.26, Fla. Stat., it was ruling on a taxpayer's necessity to comply with those legislative requirements before proceeding to court. This Court has been consistent that compliance with Sec. 215.26, Fla. is required and mandatory of all taxpayers before they proceed to court. When used in today's context, that requirement to comply with Sec. 215.26, Fla. Stat., is "jurisdictional" no less than the requirements set forth in Sec. 768.28, Sec. 72.011 and Sec. 194.171. Fla. Stat.

Respondents are quite wrong in suggesting that Sec. 215.26, Fla. Stat., is not jurisdictional because of the fact that circuit courts have jurisdiction to hear refund cases. Of course circuit courts have jurisdiction to hear refund cases, the Legislature granted them that jurisdiction in Sec. 26.012(2)(e), Fla. Stat. Thai is not the issue in this case. The issue in this case is the failure of the Respondents to comply with Sec. 215.26, Fla. Stat., prior to initiating their refund action in circuit court. The Legislature, which has the power to set the jurisdiction of the circuit courts, has limited the circuit court's exercise of jurisdiction in tax refund cases. The Legislature has provided that circuit courts may hear tax assessment and "denial of refund[s]"cases. This language is key not only to the jurisdiction of the circuit courts, but to the outcome of this case.

What the Respondents have not squared is the inconsistency of their argument with the "denial of refund" language in the only statute giving the circuit courts jurisdiction over refunds.

The circuit court has only that jurisdiction provided by the Legislature and that grant of jurisdiction is contained in Sec. 26.012(2)(e), Fla. Stat. What the Respondents have failed to deal with is "How can a circuit court have jurisdiction over a "denial of refund" if there has been no requested refund under Sec. 215.26, Fla. Stat. in the first place?"

Sec. 26.012(2)(e)'s "denial of refund" is consistent with the argument that Sec. 215.26, Fla. stat. is jurisdictional. Circuit courts cannot, by the express language of the Legislature, have jurisdiction over an action concerning a refund of taxes until a taxpayer has requested and been denied a refund under Sec. 215.26, Fla. Stat. Without a timely filed application for a refund and a denial thereof, there is **no jurisdiction in the circuit court**.

The reason the Petitioners have argued they way they have is simple they cannot otherwise deal with the legislative procedure set forth in Sec. 215.26, Fla. Stat. The Legislature has provided the requirement that taxpayers comply with the conditions set forth in Sec. 215.26, Fla. Stat. This Court has recognized the Legislature's authority to set such conditions even when there is a constitutional challenge to a statute. This Court has recognized that there may be reasons to either grant or deny a refund on nonconstitutional grounds before seeking judicial review, and such a procedure to relieve the courts of the need to go through each and every taxpayers records to determine many financial issues. As pointed out in Reynolds Fasteners, following the mandated not only avoids litigation, it can streamline the facts and issues then presented to a reviewing court.

Whether the Respondents think the Legislature was wise in its enactment of Sec. 215.26, Fla. Stat., is not an issue here. This is one of those instances where a legislative body has mandated exhaustion of a specific procedure before initiating judicial action. In such a situation, the legislative mandate **must** be followed no matter what. See McCarthy v. Madigan, 503 U.S. 140, 144, 112 S.Ct. 1081, 1086 (1992). In a situation such as this, futility arguments have no place. The procedure set forth in Sec. 215.26, Fla. Stat., is constitutionally valid and has no

exceptions. The case fits squarely within the legislatively mandated language in Sec. 215.26, Fla. Stat., bolstered by the jurisdictional statute Sec. 26.012(2)(e), Fla. Stat.'s, "denial of refund" language, which Respondents failed to comply.[3]/

Sec. 215.26(4), Fla. Stat., is the "exclusive remedy and procedure" by which a person seeks a refund. Nothing put forward by the Respondents have changed that conclusion.[4]/

B. Victor Chemical is not Questionable Authority After McKesson; Victor Chemical is Consistent With the Decisions of the United States Supreme Court and in Accord With the Decisions of Other State Supreme Courts

Respondents argue that U.S. Supreme Court's decision in McKesson has made Victor Chemical obsolete. Nothing could be further from the truth. In fact, Victor Chemical is not questionable authority after McKesson. Victor Chemical's reasoning is consistent with the decisions of the United States Supreme Court and in accord with the decisions of other state supreme courts.

First, Respondents have ignored the United States Supreme Court's discussion of "procedural" refund statutes in general and Sec. 215.26, Fla. Stat., in particular, and their affect of any "refunds" to be paid to an offended taxpayer. In McKesson, the United States Supreme Court cited with favor Section 215.26, Florida Statutes, as an example of a valid state statute that can be used to protect the fiscal integrity of the state. Respondents are apparently unaware that

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[3]/ In footnote 4, Respondents disagree with the Petitioners' assertion that a refund denial by ACHA must be filed in 60 days or be barred. Granted, the PMATF is not covered by Sec. 72.011, Fla. Stat. But the denial of a refund is final agency action and under Sec. 120.68, Fla. Stat., Respondents would only have 30 days to seek review. The Petitioners were being generous with the 60 days to be consistent with other taxpayers.

[4]/ The cases cited by the Petitioners in their argument that the Legislature's requirements contained in Sec. 215.26, Fla. Stat., were mandatory were all decided upon a reading of Sec. 215.26(2), Fla. Stat. Respondents' reliance on a staff analysis of SB 4B, concerning the enactment of subsection (4) to Sec. 215.26, Fla. Stat. in 1983, does nothing to support their position that this Court should reverse the Court's previous decisions grounded on subsection (2).

in McKesson, the Supreme Court described ways that a state, in order to protect its fiscal position, may enact laws to protect it's fiscal integrity by stating:

> A State's freedom to impose various **procedural** requirements on actions for postdeprivation relief sufficiently meets this concern with respect to future cases. The State might, for example, provide by statute that refunds will be available only to those taxpayers paying under protest or providing **some other timely notice** of complaint; execute any refunds on a reasonable installment basis; **enforce relatively short statutes of limitations** applicable to such actions.[5]/ (e.s.)

McKesson, 496 U.S., at 45. Continuing on, the Court said "[t]he State's ability in the future to invoke such procedural protections suffices to secure the State's interest in stable fiscal planning when weighed against its constitutional obligation to provide relief for an unlawful tax."[6]/ Id. Later in the opinion, again referring to Florida's argument of uncertain fiscal protection, the Court restated it position:

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

Id, at 50.

Apparently, Respondents are under the mistaken belief that McKesson stands for the

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[5]/ At this point in the opinion the Supreme Court inserts Footnote 28 which states:

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

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

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

proposition that a refund must be granted in all cases and under all circumstances. The Supreme Court cases of McKesson, James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 111 S.Ct. 2439 (1991) and Fulton Corporation v. Faulkner, __ U.S. __, 116 S.Ct. 848, 861-862 (1996), do not stand for the proposition that a state must, as a matter of federal law, provide retroactive "remedies." To the contrary, the Supreme Court has clearly stated in those cases that the remedy is left to the states to craft. Id. The holding of those cases concerned the "retroactive" application of the "rule of law" to then pending cases. Those cases specifically and directly did **not** deal with "remedies." As the U.S. Supreme Court stated, in discussing that remedies to be applied after a decision on the law was decided:

> Once a rule is found to apply "backward," there may then be a further issue of remedies, i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. Subject to possible constitutional thresholds, see McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation, 496 U.S. 18, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990), the remedial inquiry is one governed by state law, at least where the case originates in state court. See American Trucking Assns., Inc. v. Smith, 496 U.S. 167, 210, 110 S.Ct. 2323, 2348, 110 L.Ed.2d 148 (1990) (STEVENS, J., dissenting).

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

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

Id., 501 U.S., at 544, 111 S.Ct., at 2448 (e.s.). James Beam did have a discussion on the remedial limitations of the McKesson "rule of law" affect on taxpayers. That Court said:

> Nor do we speculate about the remedy that may be appropriate in this case; remedial issues were neither considered below nor argued to this Court, save for an effort by [Jim Beam] to buttress its claim by reference to our decision last Term in *McKesson*. As we have observed repeatedly, federal "issues of remedy . . . may well be intertwined with, or **their consideration obviated by**, issues of state law." Bacchus, 468 U.S., at 277, 104 S.Ct., at 3058. Nothing we state here deprives [Georgia] of [its] opportunity to raise **procedural bars to recovery** under state law or **demonstrate reliance interests** entitled to consideration in determining the nature of the remedy that must be provided, **a matter with which**

***McKesson* did not deal.** (e.s.)

James Beam, 501 U.S., at 544, 111 S. Ct., at 2448.

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

> The Court has suggested that some of them involve a particular kind of constitutional violation--a kind that the State could cure without repaying back taxes. See *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation,* 496 U.S. 18, 40-41, 110 S.Ct. 2238, 2252-2253, 110 L.Ed.2d 17 (1990). Where the violation depends, in critical part, upon differential treatment of two similar classes of individuals, then one might cure the problem either by similarly burdening, or by similarly unburdening, both groups. Where the violation stemmed from, say, taxing the retirement funds of one group (retired Federal Government employees) but not those of another (retired state government employees), see *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989), then the State might cure the problem either (1) by taxing both (imposing, say, back taxes on the previously advantaged group, to the extent constitutionally permissible), or (2) by taxing neither (and refunding back taxes). Cf. *McKesson Corp., supra,* at 40-41 and n. 23, 110 S.Ct., at 2252-2253 and n. 23. And, if the State chooses the first, then the taxpayers need receive no refund. But, that result flows not from some general "remedial" exception to "retroactivity" law, but simply from the fact that the state law that the taxpayer had attacked now satisfies the Constitution.
>
> Suppose a State collects taxes under a taxing statute that this Court later holds unconstitutional. Taxpayers then sue for a refund of the unconstitutionally collected taxes. Retroactive application of the Court's holding would seem to entitle the taxpayers to a refund of taxes. But, what if a pre-existing, separate, independent rule of state law, having nothing to do with retroactivity--a rule containing certain procedural requirements for any refund suit--nonetheless barred the taxpayers' refund suit? See *McKesson Corp., supra,* at 45, 110 S.Ct., at 2254; *Reich v. Collins,* 513 U.S. ----, ----, 115 S.Ct. 547, 550, 130 L.Ed.2d 454 (1994). Depending upon whether or not this independent rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim. See *McKesson Corp., supra,* at 45, 110 S.Ct., at 2254.

Therefore, contrary to the Respondents' assertions, Sec. 215.26, Fla. Stat., as interpreted by this Court as a procedural statute of nonclaim limiting a person's right to seek a refund has

been recognized by the Supreme Court as valid and proper. It has also been recognized and applied by the appellate and supreme courts of other states. [7]/

II. SECTION 215.26, FLORIDA STATUTES IS A STATUTE OF NON-CLAIM

The Respondents have attempted to minimize the significance of this Court's prior decisions and have suggested that this Court to overturn 50 years of law without any support or basis or thought as to the outcome of their request. They seek from this Court a reversal of this Court's specific language and discussion in Victor Chemical that Sec. 215.26, Fla. Stat., is a statute of nonclaim.[8]/

Respondents' argument seems to be predicated upon this Court's decision in Reynold's Fasteners and the United States Supreme Court's decision in McKesson. The Respondents have misread the underlying reasoning of Reynold's Fasteners and have added new additional meaning not contained in that opinion.

Respondents citation to McKesson on the question of a "timely" refund claim is also curious considering the cited portions of the U.S. Supreme Court decisions, in the Initial Brief and above, discussing timely compliance with state and federal refund statutes. In addition, the Respondents citation to McCarthy is curious for a second reason. While citing the general propositions of the case, to which the State does not disagree, the Respondents then fail to address Congress' equivalent refund time limitation statute, 26 U.S.C. § 6511, and the decisions

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[7]/ The Court should take note that the State, on pages 20 through 25 of its Initial Brief, discussed the U.S. Supreme Court's interpretations of the equivalent Internal Revenue Code sections and other state courts decisions discussing state refund statutes nearly identical to Sec. 215.26, Fla. Stat. All of these decisions concluded that the respective refund statutes must be fully complied with in a timely manner or the taxpayer lost his right to a refund, decisions squarely in agreement with Victor Chemical. However, Respondents chose, for whatever reason, not to dispute or distinguish the cases cited by the State.

[8]/ The timely filing requirement of Sec. 215.26(2), Fla. Stat., was not an issue in Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994). The issue is of great significance in this case, and in both Nemeth and Miami Tiresoles.

of the United States Supreme Court requiring strict compliance with that law. See, e.g. Jones v. Liberty Glass Co., 332 U.S. 524, 68 S.Ct. 229 (1947); Kavanagh v. Noble, 322 U.S. 535, 539 (1947); Commissioner of Internal Revenue Lundy, __ U.S., at __, 116 S.Ct. 647, 651 (1996). The State laid out an entire argument on this point on pages 22 through 25 of its Initial Brief. There is no "express" jurisdictional language in 26 U.S.C. § 6511 and yet the Supreme Court considers that law a congressional mandate and an imperative. The Respondents never responded to these issues.

For all their argument, Respondents cite no real reasons why this Court should alter its 50 year old decision in Victor Chemical that Sec. 215.26, Fla. Stat., is a statute of non-claim. That the time to apply for a refund begins to run from the date of payment of the fee or tax and cannot be tolled by a taxpayer by any other means than the filing of a refund claim with the Comptroller. In fact, Respondents take their position to extremes by asserting that the Court did not hold that Sec. 215.26, Fla. Stat., was a statute of nonclaim, "only in the nature of a nonclaim." This Court in Victor Chemical repeated that the refund statute was a nonclaim statute and that the time to file began on the date of payment:

> 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.
>
> and
>
> "[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.[9]/

Respondents then makes the argument that the "jurisdictional" language in Sec. 72.011(5)

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[9]/ See In re Woods' Estate, 133 Fla. 730, 733-734 183 So. 10, 12 (1938); 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, 501, 29 So. 2d 246, 247 (1947).

and Sec. 194.171(6), Fla. Stat., makes those statutes of nonclaim but their absence in Sec. 215.26, Fla. Stat., makes the refund statute not a nonclaim statute. First, Sec. 215.26, Fla. Stat., was enacted in 1943 and has consistently been interpreted for more than 50 years by this Court and the courts of appeal to be statute of nonclaim. This is not new nor is it some secret from the public. Second, it is not a statement of "jurisdictional" that makes Sec. 215.26, Fla. Stat., "nonclaim," it if the phrase "forever barred" in subsection (2) that makes it nonclaim. The fact that a taxpayer has three (3) or more years to challenge a tax after it is paid, makes the failure to do so all the more reason to continue the interpretation of nonclaim. Finally, Respondents failed to discuss this Court's nonclaim interpretation of Sec. 768.28, Fla. Stat. To accept the Respondents interpretation, there would be an unending time period where a refund would still be possible.

To argue that 3 or more years to file for a refund claim is not enough to satisfy due process access to the courts is to ignore Sec. 72.011 and Sec. 194.171, Fla. Stat.'s, requirement to bring an action in **60 days**. See Markham v. Neptune Hollywood Beach Club, 527 So. 2d 814 (Fla. 1988); Bystron v. Diaz, 514 So. 2d 1072 (Fla. 1987).

Curiously absent is any discussion by the Respondents of why the Legislature did not, if a tax refund is controlled by the general statute of limitations, merely insert the appropriate language into Ch. 95, Fla. Stat. Ch. 95 is entitled "Limitations of Actions" and addresses what events are covered by what period of limitations. It is not as if the Legislature could not have done so. The Legislature did provide in Sec. 95.091, Fla. Stat., for a limitation on actions to collect taxes. It could just as easily have created a subsection entitled "Limitation on actions for refunds of collect taxes."

But the Legislature did not. Rather, the Legislature set out in Sec. 215.26, Fla Stat., the specific terms and conditions that a taxpayer must meet in order to receive a refund of monies paid to the State. The Legislature's intent is clear from the wording of the act. Subsection (1)

states, in pertinent part,:

> The Comptroller of the state may refund to the person who paid same, or his or her heirs, personal representatives, or assigns, any moneys paid into the State Treasury which constitute:
>
> (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;

The State may refund to the person, not some class representative, who has paid the tax or the taxpayer's directly assigned legal representative.

The Legislature chose to create this statute different from a statute of limitations on purpose. The very words that a taxpayer would be "forever barred" reveals the intent that a definite time span was necessary to be applied to each and every taxpayer.

The Legislature is well aware of the Victor Chemical decision. Yet in the more than 50 years since its issuance, the Legislature has not amended that statute in any way to reject or modify this Court's reasoning in that decision or the decisions of the courts of appeal reaffirming Victor Chemical. If the Legislature had intended Sec. 215.26, Fla. Stat., not to be a statute of nonclaim but a statute of limitations; not to take effect on the date of the payment of the fee or tax, and it could be tolled by the actions of others, the Legislature would surely would have amended that law to reflect such an interpretation of Sec. 215.26, Fla. Stat. It did not!

What the Respondents have invited this Court to legislate an entirely new refund statute. This Court should decline the invitation.

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,

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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, Holland & Knight, 510 Vonderburg Drive, Suite 3005, Brandon, Florida, this 23rd day of December, 1997.

ERIC J. TAYLOR

F:\USERS\TAX\ERIC\HAMEROFF\FSC\REPLY2.WPD