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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

**MIAMI TIRESOLES, INC.**, a
Florida corporation, **M2J CORP.**,
a Florida corporation, d/b/a
Homestead Auto Service Center,
and **MARTINO TIRE CO.**,
a Florida corporation,

Petitioners,

vs. Case No. 91,055

**STATE OF FLORIDA,**
**DEPARTMENT OF REVENUE**

Respondent.
______/

ON REVIEW FROM A CERTIFIED QUESTION OF THE THIRD
DISTRICT COURT OF APPEAL
Case No. 96-3213

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# RESPONDENT'S CORRECTED ANSWER BRIEF

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## PRELIMINARY STATEMENT

Petitioners in the instant appeal, Plaintiffs below, are Miami Tiresoles, Inc., Martino Tire Company and M2J Corporation. Collectively, they will be referred to as "Petitioners" in the Answer Brief.

Respondent in the instant appeal, and the Defendant below, is the Florida Department of Revenue. It will be referred to as either "the Department" or "Respondent" in the Answer Brief.

The Court below was the Eleventh Judicial Circuit in and for Dade County, Florida. It will be referred to as "the trial court" in the Answer Brief.

References to the Record on Appeal will be prefixed with the letter R:, followed by the appropriate page number, e.g. (R: 530-535).

## PREFACE

This appeal concerns the same issues as presented in the case of Nemeth v. Department of Revenue, 686 So. 2d 778 (Fla. 4th DCA), review pending, Case No. 89,909, Florida Supreme Court, which are as follows:

1. Has the Legislature required the procedure of a written application under Section 215.26, Florida Statutes, for all tax refund requests?;

2. Has the Legislature required that an applicant file for a refund of taxes within three years of paying those taxes, pursuant to the statute of non-claim as set forth in Section 215.26, Florida Statutes, or be forever barred?[1]/

Both the Fourth District Court of Appeal in Nemeth, and the Third District Court of Appeal in the instant case, Miami Tiresoles, Inc. v. Department of Revenue, __ So. 2d __, 22 Fla. Law Weekly D1479g (Fla. 3rd DCA June 18, 1997), certified in substance the following question

[1]/ 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.

of great public importance[2]/ to this Court:

> Whether Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), cert. denied, 115 S. Ct. 2608 (1995), overruled or receded from State ex rel. Victor Chemical Works v. Gay, 74 So. 2d 560 (Fla. 1954)?
>
> Miami Tiresoles, 22 Fla Law Weekly, at D1479g.

The difference between Nemeth and Miami Tiresoles is the Fourth District held that Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), means tax refund applicants are no longer required to comply with the unambiguous legislative language of Section 215.26, Florida Statutes[3]/, while the Third District, not once but three times, came to the exact opposite conclusion. See, Westring v. Department of Revenue, 682 So. 2d 171 (Fla. 3rd DCA 1996), review denied, 686 So.2d 583 (Fla. 1996); State, Department of Revenue v. Bauta, 691 So. 2d 1173 (Fla. 3rd DCA 1997), review pending, Case No. 91,081, Florida Supreme Court; and, the instant case Miami Tiresoles.

This Court should answer the certified question 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.

**STATEMENT OF CASE AND FACTS**

The Department does not agree with the Statement of Case and Facts as set forth in the

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[2]/ The Fourth District stated the question as follows: "Whether Department of Revenue v. Kuhnlein, 646 So. 2d 717 (Fla. 1994), cert. denied, 115 S. Ct. 2608 (1995), 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 Section 215.26, Florida Statutes?" Nemeth, 686 So.2d, at 780.

[3]/ The First District Court of Appeal stated that Kuhnlein provided a "general exemption" (though the general exemption was not defined or delimited). Public Medical Assistance Trust Fund, et al., v. Hameroff, 689 So. 2d 358, 359 (Fla. 1st DCA 1997), review pending, Case No. 90,326, Florida Supreme Court. The briefing schedule of that case is in progress and oral argument has been set for February 7, 1998.

Petitioner's Initial Brief. Therefore, the Department, pursuant to Florida Rules of Appellate Procedure 9.210(c), sets forth the Statement of the Case and Facts as follows:

**SECTION 403.718, FLORIDA STATUTES: WASTE TIRE FEE.**

On June 24, 1988, the Governor signed into law the "Waste Tire Fee." Chapter 88-130, Section 42, Laws of Florida, was codified as Section 403.718, Florida Statutes, was effective on October 1, 1988, with the waste tire fee becoming effective on January 1, 1989. Id. The law imposed a $.50 a tire fee on each and every tire sold in Florida after January 1, 1989. The waste tire fee increased to $1.00 on January 1, 1990. Section 403.718(1), Florida Statutes. (R: 531).

The waste tire fee is imposed upon the seller or dealer in tires. Section 403.718(1), Florida Statutes, ["For the privilege of engaging in business, a fee for each new motor vehicle tire sold at retail is imposed on any person engaging in the business of making retail sales of new motor vehicle tires within this state."] The waste tire fee was part of the "sales price" of the tire and subject to the Florida sales tax. Section 403.718(1), Florida Statutes. However, "[t]he fee imposed under this section shall be stated separately on the invoice to the purchaser." Section 403.718(1), Florida Statutes. Therefore, the Legislature has directed the fee be passed on to the purchaser of the tire.

The fee was, and continues to be, collected by the Department. Section 403.718(2), Florida Statutes. The fees collected are placed by the Department in the Solid Waste Management Trust Fund of the State Treasury. Section 403.718(2), Florida Statutes.

**STATE TIRE CONTRACTS.**

The facts and procedures of the State Tire Contracts come from the contracts themselves (R: 45-63; 64-67; 105-113; and 366-424) and the affidavit of Jim Den Bleyker (R: 359-364; Petitioners' Appendix 7, pp.35-40).

The State of Florida purchases motor vehicle tires for its vehicles. (R: 4-5) In order to save money, the State purchases tires in quantity, at "retail", as opposed to "wholesale" or "sales

for resale." The State, through the Department of Management Services, (formerly Department of General Services) (hereinafter "DMS") does this by competitively bidding out the privilege to sell to the State and the local governmental units to any tire company that wishes to sell to the State. (R: 359-364) This is a sole source contract and covers all tires sold to the State. The contracts are known as the "State Tire Contracts." (R: 45-63; 64-67; 105-113; 114-127; and 366-424). Goodyear chose to bid on each of the proposed State Tire Contracts commencing in March, 1989 ("STC 89"), March, 1992 ("STC 92"), and March, 1995 ("STC 95"). (R: 45-63; 64-67; 105-113; 114-127; and 366-424).

The first invitation to bid was on STC 89, which was mailed by DMS on December 2, 1988. (R: 45; 105) Goodyear submitted its bid on December 29, 1988. (R: 52; 112) The Petitioners never submitted a bid for the 1989, 1992 or the 1995 State Tire Contract. Petitioners did not submit a bid jointly with Goodyear. Petitioners are not parties to the State Tire Contract with the State or Goodyear. Petitioners are merely the agents of Goodyear tasked to carry out the terms of each STC for Goodyear with the State.

The price for each tire to be paid by the State were the prices set by Goodyear itself in its bid to the State. Tire prices have never been negotiated prices. All the bids were opened by DMS in Tallahassee on January 6, 1989. (R: 50) The bids were posted on January 18, 1989 and Goodyear was the successful bidder on STC 89. Goodyear was notified of its successful bid and the State's offer to enter into STC 89 was tendered for acceptance by February 5, 1989. Goodyear accepted and signed STC 89 on February 16, 1989. (R: 68-70; 128-130)

The second invitation to bid was on STC 92, which was mailed on December 3, 1991. (R: 360) As part of the "Invitation to Bid" on STC 92 was attached a section entitled "SPECIAL CONDITIONS." (R: 57-58)[4]/ One of the "conditions" was entitled "FEES" and stated, in pertinent part:

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[4]/ References to these pages of the STC 92 includes the backside of the contract page.

> Any environmental or waste clean up fees imposed by the State or local governments in effect at the time of the bid opening shall be included in the bid price and will not be added to invoices.

Invitation to Bid, p.4. (R: 57, backside page; R: 361). Goodyear was fully aware of the waste tire fee condition in STC 92. (R: 362, para.15) The price for each tire to be paid by the State were the prices set by Goodyear itself in its bid to the State. Tire prices in STC 92 were not negotiated prices.[5]/ Because of the specific bid specification, the price of each tire, to be paid by the State, included the waste tire fee imposed by Section 403.718, Florida Statutes. (R: 362, para.18)

Goodyear submitted its signed and notarized bid on December 27, 1991, with the SPECIAL CONDITIONS attached. (R: 122, backside page; R: 360) All the bids were opened by DMS in Tallahassee on January 4, 1991. (R: 360) The bids were posted on January 10, 1991 and Goodyear was the successful bidder on STC 92. (R: 361) Goodyear was notified of its successful bid and the State's offer to enter into STC 92 was tendered for acceptance by March 2, 1992. (R: 361) Goodyear accepted and signed STC 92 on February 4, 1992. (R: 361)

The third invitation to bid was on STC 95, which was mailed on January 13, 1995. (R: 124-127, 361, and 372). Part of the "Invitation to Bid" on STC 95 was a section entitled "SPECIAL CONDITIONS." (R: 125-127, 361, and 369-374) One of the "conditions" was entitled "FEES" and stated, in pertinent part:

> **ALL ENVIRONMENTAL OR WASTE CLEAN UP FEES IMPOSED BY THE STATE OR LOCAL GOVERNMENTS IN EFFECT AT THE TIME OF THE BID OPENING SHALL BE INCLUDED IN THE BID PRICE AND WILL NOT BE ADDED TO INVOICES!!**

Invitation to Bid, p.4 (emphasis in the original "Invitation to Bid"). (R: 126, 362, and 372) The price for each tire to be paid by the State were the prices set by Goodyear itself in its bid to the State. Tire prices for STC 95 were not negotiated prices. Goodyear was fully aware of the waste

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[5]/ The prices Goodyear charged the Petitioners for their tires is irrelevant to this case. Goodyear set the price of the tires to the State without any negotiation with the State over prices. How Goodyear chose to set the prices was Goodyear's decision alone. Goodyear was, and is, free to set whatever price it wants from a retail customer like the State.

tire fee condition in STC 95. (R: 362, para.15) Because of the specific bid specification, the price of each tire, to be paid by the State, included the waste tire fee imposed by Section 403.718, Florida Statutes. (R: 362, para.18)

Goodyear submitted its bid on February 16, 1995. (R: 361) Goodyear submitted its signed bid for STC 95 with the SPECIAL CONDITIONS attached. All the bids were opened by DMS in Tallahassee on February 21, 1995. The bids were posted on February 23, 1995 and Goodyear was the successful bidder on STC 95. Goodyear was notified of its successful bid and the State's offer to enter into STC 95. Goodyear accepted and signed STC 95 on March 8, 1995.(R: 367)

Petitioners, Miami Tiresoles, Inc. (Miami Tire), Martino Tire Co. (Martino) and M2J Corp. are Florida corporations doing business in Dade County, Florida. (R: 2-32, 530-531) Petitioners are franchisees of Goodyear and licensed to sell Goodyear's tires and products. (R: 531) Because Goodyear was awarded the "State Tire Contract," Goodyear was the exclusive tire seller to the State of Florida and the State's political subdivisions. As franchisee/agents of Goodyear, Petitioners sold Goodyear tires and products to the State of Florida and the State's political subdivisions under the "State Tire Contract." (R: 531).

**SALES OF TIRES TO THE STATE.**

Goodyear was the seller of tires and products to the State of Florida. Petitioners, on behalf of Goodyear, sold tires to the State and the State's political subdivisions according to the terms of the STCs. The price for each tire to be paid by the State were the prices set by Goodyear itself in its bids to the State. Tire prices for the STCs were not negotiated prices. Petitioners sold the Goodyear tires and products at the contract price. Petitioners could not charge the State a price other than that which was in the STC.

Because of the specific bid specifications in at least STC 92 and STC 95, the price of each tire, to be paid by the State, included the waste tire fee imposed by Section 403.718, Florida

Statutes. (R: 362) The State and local governments paid the waste tire fee to Petitioners. (R: 363). Petitioners collected the waste tire fee from the governmental purchasers from at least March, 1992. Petitioners remitted the collected waste tire fees to the Department.

**REFUND PROCEDURES.**

Petitioners claim they are entitled to a refund of the fees paid. Regardless of the basis for their claims, none of the Petitioners, or any potential class member, have to date filed a request for a refund with the Department as required by Section 215.26, Florida Statutes. Additionally, many of the monies remitted to the Department were sent as far back as 1989, beyond the jurisdictional time period set forth in Section 215.26(2), Florida Statutes,[6]/ which states in pertinent part as follows:

> (2) Application for refunds as provided by this section must be filed with the Comptroller, except as otherwise provided in this subsection, within 3 years after the right to the refund has accrued or else the right is barred. . . . The Comptroller may delegate the authority to accept an application for refund to any state agency . . . vested by law with the responsibility for the collection of any tax, license, or account due. The application for refund must be on a form approved by the Comptroller and must be supplemented with additional proof the Comptroller deems necessary to establish the claim; provided, the claim is not otherwise barred under the laws of this state.

Furthermore, Section 215.26(4), Florida Statutes, states:

> (4) This section is the exclusive procedure and remedy for refund claims between individual funds and accounts in the State Treasury.

## COURSE OF THE PROCEEDINGS BELOW

The Department, pursuant to Florida Rules of Appellate Procedure 9.210(c), would supplement the Petitioners' Statement of the Case, with the following:

The Petitioners are correct that the Department moved, pursuant to Section 215.26, Florida Statutes, to have the case dismissed. However, the Department filed a Motion for Partial Summary Judgment, (R: 153-155) on March 1, 1996, aimed solely at the refund portion of the

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[6]/ See footnote one, supra.

Petitioners' Complaint. The Department did not move at that time for summary judgment on the merits of the future declaratory action. Further, the Department moved for dismissal on two grounds, **not** one. The first ground was that the Petitioners had filed no refund claims with the Department as required by Section 215.26, Florida Statutes. (R: 153-154). As a separate, distinct and independent ground, the Department moved for dismissal of those potential refund claims that were more than three (3) years old, as the Legislature has permanently barred such claims if not made within 3 years of the date of the payment of the tax. Section 215.26(2), Florida Statutes. (R: 154).

After the Third District's decision in Westring v. Department of Revenue, 682 So. 2d 171 (Fla. 3rd DCA 1996), review denied, 686 So. 2d 583 (Fla. 1996), the Department, once again, moved to have the refund portion of Petitioners' Complaint dismissed. (R: 220-233). The Department asserted the exact same two grounds, no filing and untimely filing, for dismissal that it had in its March 1, motion for partial summary judgment. The trial court granted this motion. (R: 530-535; Petitioners' Appendix 6).

The Petitioners then proceeded to file a Motion For Summary Judgment on the merits of their Complaint on the declaratory judgment action. (R: 265-305). The Department responded by asserting that the fee was properly collectible and denying the Petitioners' assertions with opposing affidavits. (R: 325-358; R: 359-424; Petitioners' Appendix 7). In opposing the Petitioners' Motion For Summary Judgment, the Department raised two grounds for denying the Petitioners' Motion for Summary Judgment. The first ground was the issue of Petitioners' standing to challenge Section 403.718, Florida Statutes. The second ground was the issue of Petitioners entitlement to a refund of money not paid by the Petitioners, but remitted to the Department. (R: 330-337; Petitioners' Appendix 7, pp 8-15).

The Petitioners are not parties to the State Tire Contract and the contracting party and seller of the tires to the State, Goodyear, has not complained about Section 403.718, Florida

Statutes, or about the agreed upon method by which the State pays the tax under Section 403.718, Florida Statutes. (R: 330-332; Petitioners' Appendix 7, pp.8-12).

Secondly, the Department questioned the standing of the Petitioners to receive a refund of the monies they collected pursuant to the STCs and remitted to the Department under Section 403.718, Florida Statutes. The Department submitted **unrebutted** evidence, in the form of the STC95, (R: 124-127 and 365-424) and the affidavit of Jim Den Bleyker (R: 359-364; Petitioners' Appendix 7, pp.35-40), that the State is paying the tax under Section 403.718, Florida Statutes. Based on the opinion of this Court[7]/, the Department asserted the Petitioners had no right to a refund. (R: 334-337; Petitioners' Appendix 7, pp. 11-15).

## 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 was paid. If no refund request is taken within the statutory time period, the right to a refund is forever barred.

Even if the Petitioners, the dealers who collected and remitted the taxes had standing to seek any such refund, each of their claims to refund of taxes would have accrued on the date each individual Petitioner remitted the waste tire fee to the Department. For the Petitioners to seek a refund, a refund application would have to have been filed by each taxpayer within three (3) of the date each Petitioner remitted the fee to the Department. Section 215.26(2), Florida Statutes. Petitioners did not file any refund request with the Comptroller or his designee prior to the initiation of this suit. No action was taken within the three (3) period stated in Section 215.26(2),

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[7]/ State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So.2d 529 (Fla. 1973).

Florida Statutes. Consequently, there has never been a "denial of a refund."

The trial court properly dismissed 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 Petitioners did not timely file any refund request with the Department. Thus, the Petitioners' refund claims action were barred by the terms of Section 215.26(2), Florida Statutes. The Third District affirmed the trial court on this point of law, relying on its decisions of Westring v. Department of Revenue, 682 So. 2d 171 (Fla. 3rd DCA 1996), review denied, 696 So. 2d 583 (Fla. 1996), and State, Department of Revenue v. Bauta, 691 So. 2d 1173 (Fla. 3rd DCA 1997), review pending, No. 91,081, Florida Supreme Court. The Third District has correctly followed this Court's decision of Victor Chemical, which recognizes that by statute one must timely file a refund request or be forever barred. This Court should affirm the decision of the Third District below.

This Court should answer the certified question by reaffirming its holding in Victor Chemical Works v. Gay. 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.

Since the Petitioners, and all the members of their potential class, have not applied for a refund, and many are now barred, Petitioners cannot maintain a refund action until they have timely filed for a refund of monies paid to the State and been denied.

## ARGUMENT

### I. A CIRCUIT COURT DOES NOT HAVE JURISDICTION TO HEAR A TAX REFUND CASE WHEN THE INDIVIDUAL TAXPAYER HAS NOT FILED AN APPLICATION WITH THE COMPTROLLER FOR A REFUND OF MONIES HELD IN THE STATE TREASURY, AS REQUIRED BY SECTION 215.26, FLORIDA STATUTES.

Petitioners, Miami Tiresoles, Inc. (Miami Tire), Martino Tire Co. (Martino) and M2J Corp. are Florida corporations doing business in Dade County, Florida. (R: 2-32, 530-531) Petitioners are franchisees of Goodyear and licensed to sell Goodyear's tires and products. (R: 531) Because Goodyear was awarded the "State Tire Contract," Goodyear was the exclusive tire seller to the State of Florida and the State's political subdivisions. As franchisee/agents of Goodyear, Petitioners sold Goodyear tires and products to the State of Florida and the State's political subdivisions under the "State Tire Contract." (R: 531).

#### A. SALES OF TIRES TO THE STATE.

Goodyear was the seller of tires and products to the State of Florida. Petitioners, on behalf of Goodyear, sold tires to the State and the State's political subdivisions according to the terms of the STCs. The price for each tire to be paid by the State were the prices set by Goodyear itself in its bids to the State. Tire prices for the STCs were not negotiated prices. Petitioners sold the Goodyear tires and products at the contract price. Petitioners could not charge the State a price other than that which was in the STC.

Because of the specific bid specifications in at least STC 92 and STC 95, the price of each tire, to be paid by the State, included the waste tire fee imposed by Section 403.718, Florida Statutes. (R: 362) The State and local governments paid the waste tire fee to Petitioners. (R: 363). Petitioners collected the waste tire fee from the governmental purchasers from at least March, 1992. Petitioners remitted the collected waste tire fees to the Department.

The Petitioners spend a great deal of time urging this Court to abandon the long history of Section 215.26, Florida Statutes, and overrule Victor Chemical. Instead, the Petitioners want the

Court to adopt the "useless act" doctrine in tax cases. The majority of states do not sanction such abandonment of legislative mandates. It is for the Legislature to determine what is "useless" and what are the benefits of the refund application procedure. The fact that the Department has been consistent in its position in this case does not make the request "useless." There is in fact a very definite, specific purpose for requiring a timely written refund claim.

The Petitioners' main point is that the trial court erred because it is requiring the Petitioners to do what an act of the Legislature directs the Petitioners to have done in the first place. What Petitioners are doing, in reading the procedural requirements of Section 215.26(2), Florida Statutes, is confusing the judicial concept of "exhaustion of administrative remedies" with statutory jurisdictional conditions precedent. However, there is a vast difference between the judicially created doctrine of "exhaustion of administrative remedies" and legislatively "mandated" administrative procedures and remedies.

### B. 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 Petitioners failed to comply with any of the provisions of Section 215.26, Florida Statutes, Petitioners 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). 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, . . .

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.[8] Section 215.26(2), Florida 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.[9] 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

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

[9] 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).

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 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).[10]/ 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.[11]/ The Court began by stating the idea behind the legislative compliance

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[10]/ 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).

[11]/ 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

(continued...)

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.[12]/

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

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(...continued)

> 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.'

[12]/ 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).

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 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.[13]/ 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.

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[13]/ 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.

(2) Applications for refunds under Section 215.26, Florida Statutes, are to be filed 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.

None of the Petitioners, or any potential class member, have to date filed, timely or untimely, a request for a refund with the Department as required by Section 215.26, Florida Statutes. Additionally, many of the monies remitted to the Department were remitted by the Petitioners as far back as January, 1989, well beyond the jurisdictional time period set forth in Section 215.26(2), Florida Statutes.

This is a case where a purported taxpayer must expressly follow all of the provisions of Section 215.26, Florida Statutes, before being allowed to seek judicial relief. Had Petitioners done so, the Department could have reviewed Petitioners' refund application and provided them with an answer to their refund claim. Then, the trial court, when reviewing the Petitioners' refund denial, would have before it the Department's reasons for denying Petitioners' refund request. In this case, Petitioners would have learned that a denial of their refund request would have been based on the following:

1. Since Section 403.718, Florida Statutes, imposed the waste tire fee on the "dealer" and since in the contract between the State and Goodyear, Goodyear is the "seller" of the tires and, thus, the "dealer," Petitioners have no standing because no tax is being imposed on them by Section 403.718, Florida Statutes;

2. Since Section 403.718, Florida Statutes, imposed the waste tire fee on the "dealer" and since in the contract between the State and Goodyear, Goodyear is the "dealer," Petitioners have no standing because they are not parties to the contract between the State and Goodyear;

3. Since Section 403.718, Florida Statutes, imposed the waste tire fee on the "dealer" and since in the contract between the State and Goodyear, Goodyear is the "dealer," Petitioners have no standing to challenge what is and what is not a "retail" sale since Goodyear, the Petitioners' principal, is not challenging the relationship between Goodyear and the State;

4. Since Section 403.718, Florida Statutes, imposed the waste tire fee on the "dealer" and since in the contract between the State and Goodyear, Goodyear has agreed to include the cost of the "waste tire fee" in the purchase price of the tires to the State, Goodyear has agreed to pay the fee and the State has agreed to pay the fee. Petitioners have no standing to challenge such an agreement to pay the fee by the State or the collection and remittance by Goodyear.;

5. Since Section 403.718, Florida Statutes, imposed the waste tire fee on the "dealer" and since in the contract between the State and Goodyear, the State is paying the fee to Goodyear or Goodyear's agents (Petitioners), Petitioners have no standing because they have suffered no economic injury. See, State ex rel. Szabo Food Services, Inc. of North Carolina v. Dickinson, 286 So.2d 529 (Fla. 1973); and,

6. Since the State has agreed to pay the imposed "waste tire fee" through the contract price method rather than directly, Petitioners have no standing to assert an exemption on behalf of the State.

Second, this case is procedurally similar to State ex rel. Victor Chemical v. Gay, 74 So. 2d 561 (Fla. 1954). This is a case where the Petitioners did not challenge Section 403.718,

Florida Statutes, in any manner while another taxpayer did. The time for the Petitioners to file for a refund under Section 215.26, Florida Statutes, has run. Now the Petitioners would have this Court overrule Victor Chemical and allow them to receive refunds in total contradiction to the holding of Victor Chemical.

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, the Department of Revenue). 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 the Department, the taxpayer has 60 days within to seek review of this denial in circuit court.[14/] In fact, the final denial of a refund application is a prerequisite for the taxpayer seeking circuit court jurisdiction.[15/]

This procedure is a common sense approach chosen by the Legislature to avoid unnecessary litigation and to promote judicial economy. By not requiring the Petitioners to comply with the requirements of Section 215.26, Florida Statutes, that they first apply for a refund with the Department 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 the Department or other agency[16/] or judicial designee takes the position, prior to agency review of the refund application,

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[14/] 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."

[15/] 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 ....."

[16/] Rule 3A-44.020, Florida Administrative Code, provides that the Comptroller has

(continued...)

that the underlying tax, license fee, and so forth, was lawfully imposed, and the action is instituted within the non-claim period. The Department 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.[17] If exception to the statute is made in this case, then it will be made in every case, and the statute would be meaningless.[18]

In fact, the named Petitioners seek to extend this error to many refund claims beyond their own. The Petitioners position is that a class action lawsuit for a refund, if instituted within the non-claim period, can proceed in circuit court despite the failure of the class representative to first seek a refund pursuant to Section 215.26, Florida Statutes. This holding is in direct conflict with the First District's decision in State ex rel. Devlin v. Dickinson, 305 So. 2d 848 (Fla. 1st DCA 1974), in which that Court distinguished between the members of the purported class who had filed refund applications (within the non-claim period) and those members who had not applied for a refund. The First District held: "Florida law requires a taxpayer to *apply* for a refund of illegally imposed taxes within a certain time period and unless this is done, no refund is

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[16](...continued)
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).

[17] 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.)

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

available. F.S. § 215.26. Thus, only those who applied for this refund are entitled to be represented in the class action herein. This limitation defines the class with particularity and establishes common claims, issues and defenses." Id., at 850.[19]

The Petitioners conclude that it is a "useless act" to require them to make a demand on the Department for a refund and receive a denial when such an outcome is predictable. However, an application to the Department of Revenue for a refund is exactly what Section 215.26, Florida Statutes, requires. To conclude that this statute proscribes a "useless act" is to conclude that the Florida Legislature intended that the taxpayer and the Department both engage in useless acts in processing a refund application whenever there is a dispute as to the taxpayer's liability for the tax.

The securing of this information is neither useless or futile. Even in a "constitutional" claim this information is valuable. Courts do not need to have their time wasted with cases brought by persons who did not pay a tax or fee or one who has paid the tax or fee outside of the statute of non-claim.

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[19] This is bolstered by Section 92.39, Florida Statutes, in existence since 1832. Laws of the Florida Territory, 10th Session, No. 67, Section 4, p.105 (1832), provided:

> **[Evidence of individual's claim against the state in suits between them] -** In suits between the [state] and individuals, no claim for a credit shall be allowed upon trial, but such as shall appear to have been presented to the [Comptroller] for his examination, and by him disallowed in whole or in part, unless it shall be proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the [Comptroller's] office by absence from the [state], or some unavoidable accident. (e.s.)

See, Florida Export Tobacco v. Department of Revenue, 510 So. 2d 936 (Fla. 1st DCA 1987), which noted: "Section 92.39, Florida Statutes (1979), remains on the statute books and still requires evidence of the denial of a refund by the Comptroller as a condition of maintaining a court action." Id., at 955, n.24. See also, Frier v. State, 11 Fla. 300, 302-303 (1866)(The terms of this section must be strictly complied with by an individual in a suit against the state for the recovery of money.)

## 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;
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> (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 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.
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> 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).[20]

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 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 Petitioners are seeking a refund of fees paid under Section 403.718, 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.

### 3. THERE IS NO REASON TO ADDRESS ANY CONSTITUTIONAL QUESTION; THERE IS NO PREDOMINATE CONSTITUTIONAL QUESTION.

Part of the problem with the Petitioners' argument is their assertion that the predominate

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[20]/ 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."]

issue in the case is a "constitutional" claim. That is just not so. The predominate issues in the case concern whether or not the sale of tires to the State is a "retail" sale and whether or not the State is required to pay the fee. Neither involve a constitutional question. In fact, nowhere in Argument I of Petitioners' Corrected Initial Brief do the Petitioners state just what their overriding constitutional claim is. In any circumstance, a "constitutional" tail should not be allowed to wag the non-constitutional dog.

Also, if the Petitioners are not parties to the State Tire Contract between the State and Goodyear, if Goodyear is the seller of the tires, if the fee imposed by Section 403.718, Florida Statutes, is imposed upon Goodyear as the "seller," if the State is paying the fee through the contractual agreement with Goodyear, and if Petitioners are mere collecting agents for Goodyear, Petitioners have no standing to make any challenge to Section 403.718, Florida Statutes. Requiring a refund application from the Petitioners before proceeding to court would have told the Petitioners of this legal impediment to receiving a refund.

A primary reason for requiring a taxpayer to file a refund claim is to allow the agency to examine and test the taxpayer's reasons for a refund. A refund could be denied, as it can be here, for totally non-constitutional reasons. The agency must have the flexibility and right to examine the taxpayer's claim and resolve the issue on any grounds other than constitutional grounds. As this Court knows, a court should not address a constitutional issue if the case may be resolved on a non-constitutional basis. See, State v. Tsavaris, 394 So. 2d 418, 421 (Fla. 1978). An agency should have the same opportunity as a court. This is especially true where, as here, the Petitioners admit they are not challenging the facial constitutionality of a law but only the constitutionality as applied.

## II. A REFUND CLAIM IS BARRED WHEN NO REFUND APPLICATION WAS TIMELY FILED BY A TAXPAYER WITH THE COMPTROLLER 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. If the Petitioners were imposed with and paid the tax under Section 403.718, Florida Statutes, which the Department would assert on the substantive portion of this case that the taxpayer is really Goodyear, not the Petitioners, then in addition to filing a refund claim with the Department, the Petitioners would have had to file any claim for any payment within 3 years of the date each such payment to the Department was made.

Petitioners are partially time barred from ever requesting a refund of taxes paid under Section 403.718, 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. Petitioners did not even initiate this lawsuit within three years of much of the payments to the Department. As set forth above, Petitioners were required to follow the mandate of Section 215.26(2), Florida Statutes,[21]/ 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[22]/ else such right shall be barred.

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

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[21]/ See footnote one, supra.

[22]/ 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 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.

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.[23]/

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

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[23]/ 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 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.

("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 Petitioners 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.

### 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[24]/ 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 prerequisite to a refund suit.[25]/ 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

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[24]/ 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).

[25]/ 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.

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.

"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.
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> *                    *                    *
>
> At the least it tells us that Congress would likely have wanted to decide explicitly whether, or just where and when, to expand the statute's limitations periods, rather than delegate to the courts a generalized power to do so wherever a court concludes that equity so requires.

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

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

Id. at 852.

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)[26]/, 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 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.[27]/

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[26]/ 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.

[27]/ 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.

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]; 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) [28]/ ("[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 -

[28]/ 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.

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 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 THIRD DISTRICT COURT OF APPEAL WAS CORRECT IN ITS INTERPRETATION OF SECTION 215.26, FLORIDA STATUTES.

Petitioners want this Court to recede from its decision in Victor Chemical, claiming that

the decisions of the First and Fourth District Courts of Appeal in the cases of Public Medical Assistance Trust Fund, et al., v. Hameroff, 689 So. 2d 358 (Fla. 1st DCA 1997), review pending, Case No. 90,326, Florida Supreme Court, and Nemeth v. Department of Revenue, 686 So. 2d 778 (Fla. 4th DCA 1997), review pending, Case No. 89,909, Florida Supreme Court, are correct. Petitioners urging is misplaced because both Victor Chemical and the Third District Court of Appeal's decision in Westring decision are correct and the First and Fourth District were plainly wrong.

## A. THE FIRST AND FOURTH DISTRICTS HAVE MISREAD KUHNLEIN.

The First and Fourth Districts have misread Kuhnlein. Both courts have read into Kuhnlein language and rulings not made by this Court to support their decisions. First, this Court made no definitive ruling on Section 215.26, Florida Statutes. This Court did not hold that statute unconstitutional or invalid in any manner, create an exception for a constitutional challenge or overrule any of its, or the courts of appeals', decisions upholding the mandatory compliance with Section 215.26, Florida Statutes.

The Fourth District concluded that Kuhnlein had, contrary to the conclusion of the Third District in Westring, overruled Victor Chemical. This Court did not overrule Victor Chemical.

The First District went further, even though this Court stated in State ex rel. Victor Chemical v. Gay, that "where no exception 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 [§ 215.26, F.S.]." The First District stated:

> 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. (e.s.)

Hameroff, 689 So. 2d, at 359. This Court could have receded from Victor Chemical. The First

District did and created an exception to the refund statute.[29]

For the reasons just stated, the First and Fourth Districts have misread Kuhnlein. The Department urges this Court to reverse those decisions and affirm the Third District's decision in Westring. Westring tracks the language of the Legislature exactly and comports with the Supreme Court's holding of Victor Chemical.

### B. KUHNLEIN NEVER ADDRESSED THE NON-CLAIM, TIME REQUIREMENT OF SECTION 215.26(2), FLORIDA STATUTES, AND THE FIRST AND FOURTH DISTRICTS IGNORED THAT ISSUE AS PRESENTED TO THEM.

The question of a "timely" filing was never before this Court in Kuhnlein. However, that issue was before both the First and Fourth District Courts and both avoided the issue. Both Courts ignored that the filing of a refund claim is a two-step operation; written filing **and** a timely filing. In both Nemeth and Hameroff, there were taxpayers who clearly, and forever, out of time on the date each suit was filed. That issue should be addressed here.

During the course of the appeals of Nemeth and Hameroff, the State raised two separate and distinct issues. The first was whether or not the taxpayer had to individually file a claim for a refund under Section 215.26, Florida Statutes. The First and Fourth District Courts, in their opinions, addressed this first issue.

However, the State also argued that in Nemeth **all** the class members and in Hameroff one of the Appellees, and some of the potential class members, paid the assessment more than three years before but had not filed a refund claim within 3 years of the date of the payment of the assessment, as required pursuant to Section 215.26(2), Florida Statutes. The State argued that under the holding of State ex rel. Victor Chemical Works v. Gay, these taxpayers were "barred" from ever receiving a refund. The Kuhnlein decision **never addressed the statute of non-claim as provided for in Section 215.26, Florida Statutes, because the "timeliness" issue was not**

[29] However, while creating the "exception," the First District did not explain what the nature or extent of the exception or who came under it.

**an issue in Kuhnlein.**

In Hameroff, The Appellees, Dr. Nathan M Hameroff, M.D., and his practice, Gateway Radiology Associates, P.A., (Gateway), paid its assessment in 1991. However, Gateway never applied for a refund under Section 215.26, Florida Statutes, and this suit was not brought until 1995, more than three years after the date of payment to the Agency for Health Care Administration. In Nemeth, all the taxpayers paid the fee imposed by Section 320.072(1)(b), Florida Statutes, by June 30, 1991, the date of the repeal of the tax. But no refund applications were ever filed by anyone who paid that fee and the lawsuit was not filed until October 4, 1994, more than 90 days after the 3 year period for the last taxpayer had expired.

To the extent the First and Fourth District Court read Department of Revenue v. Kuhnlein, to also answer the "timeliness" issue, those Courts misapprehended the Kuhnlein decision. There were **no** taxpayers before the Court in Department of Revenue v. Kuhnlein, who paid the impact fee more than three years before that suit was initiated. In other words, the question of a "timely" filing and the statute of non-claim, Section 215.26(2), Florida Statutes, was not before this Court in Kuhnlein. Thus, this Court, in Kuhnlein, did **not** create, either expressly or by implication, an exception to the timeliness requirement of Section 215.26(2), Florida Statutes; and did not overrule any decision of the Supreme Court or the appellate courts on the requirement to file for a refund within three years of the date of payment.

**C IT IS IMPORTANT FOR THIS COURT TO REAFFIRM THE HOLDINGS OF VICTOR CHEMICAL.**

For very important policy reasons, it is vitally important for this Court to clarify the confusion surrounding Section 215.26, Florida Statutes, and reaffirm this Court's holdings in Victor Chemical. What is at stake is the Legislature's chosen refund statute and the refund procedures.

As discussed above in Reynolds Fasteners, Inc. v. Wright, State ex rel. Victor Chemical Works v. Gay, and State, ex rel. Tampa Electric Company v. Gay, 40 So.2d 225 (Fla. 1949), all

taxpayers seeking a refund are required to file a refund claim within three years of the payment of the tax or assessment. Section 215.26(2), Florida Statutes. The State presented this point clearly to both the First and the Fourth Districts. However, both of those courts refused to address this issue. It was an important omission by those courts as the issue of filing a refund claim is separate and distinct from filing a timely claim. For example, one can file a refund claim but do it in a untimely manner and be barred. If one fails to file a claim but the time has not yet run, that person can file a refund claim with the proper agency. As separate and distinct issues, the filing of a claim and a timely filing must be individually addressed and answered.

The effect of those courts refusal to rule on the timeliness question, and Petitioners' request for this Court to follow those courts, means there is no statute of non-claim whatsoever in a refund case. Those courts have effectively overruled Section 215.26, Florida Statutes. A taxpayer could challenge the constitutionality of a tax at any time, and taxpayers who paid the tax some 20 years ago, could file for a refund for those taxes.

This is not what the Legislature intended with the passage of Section 215.26(2), Florida Statutes. This Court has been consistent in its interpretation of the jurisdictional time limitations contained in Section 215.26, Florida Statutes, and should adhere to its decision in Victor Chemical.

## CONCLUSION

This Court should answer the certified question 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. Further, this Court should affirm the Third District's decision which upheld the trial court's order granting the Department's Motion for Partial Summary Judgment.

Respectfully submitted,

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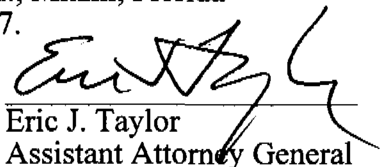
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to: NORMAN S. SEGALL, Esquire; KEITH MACK, LLP., First Union Financial Center, 20th Floor, 200 South Biscayne Blvd., Miami, Florida 33131-5633, this 30th day of October, 1997.



Eric J. Taylor
Assistant Attorney General

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