SUPREME COURT OF FLORIDA

CASE NO. 91,055

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.

THE STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Respondent

(District Court of Appeal, Third District Case #96-3213)

PETITIONERS' REPLY BRIEF

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PREFACE

Rather than respond in any meaningful way to the contents of the Tire Dealers' Initial Brief and their discussion of *Department of Revenue v. Kuhnlein*, 646 So.2d 717 (Fla. 1994), cert. denied, 115 S. Ct. 2608 (1995), the constitutional restraints upon the Department to decide the Tire Dealers' constitutional basis for a refund, or the Useless Act Doctrine, the Department throws up smoke in the form of jurisdiction and standing arguments. This Reply Brief will redirect the focus of this appeal to the certified question and certified express conflict and will demonstrate that *Kuhnlein* and the application of the Useless Act Doctrine are in harmony with recent authority from the United States Supreme Court.

Moreover, contrary to the representation by the Department, applications for refund have been filed by both Miami Tiresoles, Inc. and Martino Tire Co., which, for periods of fourteen months and ten months, respectively, the Department has utterly ignored. (A10) The Department's failure to rule on this application for such an unreasonable amount of time, coupled with its unequivocal written expressions that the Tire Dealers have no right to a refund even had *Fla. Stat.* §215.26 been followed,[1] plainly demonstrate the futility of the administrative process.

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[1]This rather candid expression from the Department that an application for refund would be denied is found most recently in its Corrected Answer Brief in this appeal filed on October 30, 1997. See Department's Corrected Answer Brief, at page 19.

All the issues in this case have been litigated and adjudicated twice each by a trial court and the Third District Court of Appeal, resulting in an order on the second appeal effectively sanctioning the Department by an award of attorney's fees for the Department's spurious justifications for collection of the Waste Tire Fee on tire sales made under state tire contracts. Indeed, one would think based upon settled law that the Department would be bound to pay a refund without further judicial intervention. Not so, unfortunately, as this case exemplifies.

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REPLY ARGUMENT

I. THE CONSTITUTIONAL CLASS NEED NOT FILE A REFUND APPLICATION PURSUANT TO *FLA. STAT. §215.26* PRIOR TO FILING SUIT ON THEIR REFUND CLAIMS IN CIRCUIT COURT BECAUSE THE UNITED STATES SUPREME COURT HAS CARVED OUT AN EXCEPTION IN CASES POSING CONSTITUTIONAL CHALLENGES.

McKesson Corporation v. Division of Alcoholic Beverages and Tobacco, 496 U.S., 110 S.Ct. 2238 (1990) confirms the propriety of *Kuhnlein* and illustrates that *State ex rel. Victor Chemical Works v. Gay*, 74 So.2d 560 (Fla. 1954)is no longer good law. *McKesson* held that state refund statutes must adhere to the due process clause of the United States Constitution by providing a meaningful, clear and certain remedy for taxpayers seeking refunds of taxes claimed to be unconstitutionally imposed. *McKesson, supra.*

In *McKesson*, a taxpayer sought declaratory relief that a particular liquor tax unconstitutionally violated the commerce clause, injunctive relief against future enforcement of the tax and a full refund of the unconstitutionally-imposed tax. This Court affirmed a grant of declaratory and injunctive relief, but denied McKesson's right to any refund. *Division of Alcoholic Beverages and Tobacco, Department of Business Regulations v. McKesson*, 524 So.2d 1000(Fla. 1988). The Supreme Court reversed:

> [T]he Due Process Clause requires the State to afford taxpayers a meaningful opportunity to secure postpayment relief for taxes already paid pursuant to a tax scheme ultimately found unconstitutional. We therefore agree

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> with petitioner that the state court's decision denying such relief must be reversed.
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> * * *
>
> If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 496 U.S. at 22 and 31, 100 S.Ct. at 2242 and 2247. The "meaningful backward-looking relief" contemplated by *McKesson* for an unconstitutionally-imposed tax is not limited by the conditions imposed by the Florida refund statute, but rather necessitates a full refund of all taxes collected in violation of constitutional guarantees:

> The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to collect these unlawful taxes by coercive means and not incur any obligation to pay them back... would be in contravention of the Fourteenth Amendment. (Citations omitted).

Id. 496 U.S. at 39, 110 S.Ct. at 2251. See also *United States on behalf of The Cheyenne River Sioux Tribe v. State of South Dakota*, 105 F.3d 1552, 1560-61 (8th Cir. 1997), ("when a state tax is declared to be invalid... because it is beyond the State's power to impose ..., the State must 'undo' the unlawful deprivation by refunding the tax previously paid under duress, [the state refund statute notwithstanding]"); *United States Shoe Corp. v. United States*, 907 F.Supp. 408, 421 (Ct. Int'l Trade 1995),(Musgrave J., concurring) (ruling the Due Process Clause required "a restitution

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of all taxes heretofore exacted under the Act in violation... of the United State Constitution", notwithstanding the two year limitations contained in the federal refund statute) affirmed, 114 F.3d 1564, cert. granted, ___ S.Ct. _____, 1997 WL 561769 (October 31, 1997); *Cambridge State Bank v. James*, 514 N.W.2d 565(Minn. 1994) (affirming trial court's conclusion that Plaintiffs were entitled to refunds of the unconstitutionally imposed tax for *all* tax years in question, notwithstanding the limitations contained in the state refund statute).

McKesson and its progeny confirm constitutional limitations upon state governments, like Florida and the Department here, that collect taxes in violation of certain constitutional guarantees, and only provide refunds through a post-deprivation procedure. The limitations contained in *Fla. Stat.* 215.26 do not provide a "meaningful opportunity to secure postpayment relief" as contemplated by *McKesson*. The reasons, as explained in *McKesson* and implicit in *Kuhnlein*, are two-fold: a) The Department is powerless to pass upon constitutional questions; and b) the limitations period in the refund statute necessarily fails to "undo" the unconstitutionally-imposed tax for all payment periods. In *Reich v. Collins*, 513 U.S. 106, 115 S.Ct. 547 (1994), the Supreme Court refused to apply the Georgia tax refund statute because it failed to provide "meaningful backward-looking relief... consistent with... *McKesson*" in that the statute contained limitations on the

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ability to obtain a refund of all taxes unconstitutionally collected:

> Under [a postpayment refund] regime, taxpayers need not have taken any steps to learn of the possible unconstitutionality of their taxes at the time that they paid them. Accordingly, they may not now be put in any worse position for having failed to take such steps.

Id. at 551

As explained in the following subsection, it is *McKesson* and its progeny that make *Gay* bad law and *Kuhnlein* good law. *Gay* rested its decision on the now-discredited notion that refunds of even unconstitutionally-imposed taxes are solely a matter of legislative grace, and that courts have no authority to award refunds outside of the statutory framework set forth in *Fla. Stat.* §215.26. *McKesson* and the subsequent cases interpreting *McKesson* counsel otherwise--that courts do have the power to award refunds based upon unconstitutionally-imposed taxes without regard to the limitations contained in a state tax refund statute.[2]

In its Answer Brief, however, the Department argues that *Fla. Stat.* 215.26 is jurisdictional and all of its requirements must be

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[2]The Department's implication that unless the limitations period, contained in *Fla. Stat.* §215.26(2) is enforced, the Tire Dealers and all taxpayers will enjoy an unlimited limitations period is simply not so. Although *McKesson* mandates a full refund of all taxes unconstitutionally imposed and collected, the limitations period contained in *Fla. Stat.* §95.11(3)(p) has been held to apply to actions asserting a violation of the Florida Constitution. *McRae v. Douglas*, 644 So. 2d 1368 (Fla. 5th DCA 1994) ("a violation of the Florida Constitution would fall within the four (4) year limitation in §95.11(3)(p) [as it constitutes] "any action not specifically provided for in the statute").

satisfied before a taxpayer may receive a refund or seek judicial relief. The Department bottoms its claim on the doctrine of sovereign immunity, the same rationale upon which this Court rested its decision in *Gay*. Judge Musgrave's concurring opinion in *United States Shoe Corp. v. United States, supra,* explains why this argument must fail[3]:

> Although the ... government enjoys broad immunity, this immunity does not extend to unconstitutional behavior, and a [state refund statute] that operates in violation of the Due Process Clause constitutes an invalid exercise of the power of [the government] which does not immunize the government from suit.
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> * * *
>
> 'To hold otherwise would be to create the possibility that [the government] could act unconstitutionally and then attempt to shield its action from review by virtue of sovereign immunity.' *Bartlett v. Bowen,* 816 F.2d 695, 708 (D.C. Cir. 1987). Thus, it is to no avail that the interlocutor points to the jurisdictional nature of the statute of limitations presently under consideration. Moreover, 'the courts... have recognized a principle that the constitutional guarantee of an independent judiciary limits the legislature in the exercise of its power to regulate court jurisdiction.' *Bartlett,* 816 F.2d at 705. The judicial branch must not countenance the disenfranchisement of democratic constitutional rights in deference to the royal cloak of sovereign immunity. To do so would be to abrogate the judiciary's proper role as protector and final arbiter of constitutional rights, a role implicit in the separation of powers established by

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[3]This argument also directly conflicts with Fla. Stat. §26.012(2)(e) which grants original jurisdiction to the circuit courts "in all cases involving [the] legality of any tax . . . or denial of refund...." The Tire Dealers are challenging the legality of the Waste Tire Fee upon both constitutional and statutory grounds. Accordingly, the Department's lack of jurisdiction arguments must fail.

> our constitutional scheme and made decisively explicit in *Marbury v. Madison*, 5 US 137, 2 L.Ed. 60(1803).

United States Shoe Corp. v. United States, 907 F.Supp. 408, 421 (Ct. Int'l Trade 1995). See also *Int'l Tel. & Tel. Corp. v. Alexander*, 396 F.Supp. 1150, 1163 n.31 (D.Del. 1975) ("as previously noted, both [tax refund statutes] are jurisdictional and are within the power of Congress to enact.... These respective sources of power, however, cannot be utilized by Congress to shield from judicial review governmental action violative of constitutional guarantees."); and Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale Law Journal 1425, 1427 (1987) ("[W]henever a government entity transgresses the limits of its delegation [of powers] by acting ultra vires, it ceases to act in the name of the sovereign, and surrenders any derivative "sovereign" immunity it might otherwise possess.").

Here, the Tire Dealers allege, among other things, that they are entitled to a refund of all fees unconstitutionally imposed by the Department.[4] Consistent with the rulings expressed above, the

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[4]In drafting their complaint, the Tire Dealers merely patterned their claims for relief upon the ruling and statutory construction contained in *State Department of Revenue v. J& B Operating Co., I., Inc.*, 663 So.2d 10 (Fla. 3d DCA 1995). Although the Department disagrees, when a court offers an appropriate legal construction of a state statute that an administrative body is authorized to implement, that administrative body must adhere to such a ruling. Compare *City of Ocoee v. Central Florida Professional Fire Fighters Ass'n*, 389 So. 2d 296, 300 (Fla. 5th DCA 1980) (lack of court precedent construing statute excuses administrative body from making erroneous interpretation).

Florida Constitution guarantees that only the judicial branch can consider constitutional questions. *Article V, Sections 1 & 5 Fla. Constitution*: a proposition the Department does not dispute.[5] As a result, *Fla. Stat.* §215.26 should not be used as a jurisdictional barrier to the Tire Dealers' refund claims based on express constitutional violations.[6]

II. *DEPARTMENT OF REVENUE V. KUHNLEIN*, 646 So.2d 717 (Fla. 1994) HAS OVERRULED OR RECEDED FROM *STATE ex rel. VICTOR CHEMICAL WORKS V. GAY*, 74 So.2d 560 (FLA. 1954), BECAUSE *KUHNLEIN* IS CONSISTENT WITH APPLICABLE UNITED STATES SUPREME COURT AUTHORITY, WHEREAS *GAY* IS NOT.

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[5] "Further, the question of what constitutes an 'impairment of contract' is a judicial question. It is not for the Department to determine if a particular statute impairs a particular contract." Department's Initial Brief on Trial Court's Award of *Fla. Stat.* §57.111 Fees in *J&B Operating Co., I, Inc.*, at p.7(A9).

[6] The statutory refund application procedure is applicable in only a limited and defined number of circumstances, none of which apply to the refund claims of the Tire Dealers. Specifically, seeking a refund based on a violation of certain constitutional rights or an erroneous construction of the taxing statute, as the Tire Dealers argue here, is not contemplated by the three sets of circumstances to which the refund application procedure applies. Fla. Stat. §215.26(1) is limited to:

> (a) An overpayment of any tax, license, or account due;
> (b) A payment where no tax, license, or account is due; and
> (c) Any payment made into the State Treasury in error.

The aging *Gay* decision is inconsistent with *McKesson*. *Gay* no longer represents good law[7] and the certified question must be answered in the affirmative.[8]

Gay is inconsistent with *McKesson* in two respects: First, *Gay* holds that even unconstitutionally-imposed taxes cannot be refunded absent legislative authority:

> money cannot be refunded or recovered once it has been paid although levied under the authority of an unconstitutional statute.... The recovery of illegally exacted taxes is solely a matter of governmental grace.

State ex rel. Victor Chemical Works v. Gay, 74 So.2d 560, 562 (Fla. 1954). This ruling denies a taxpayer the "meaningful backward-looking" relief *McKesson* requires.

Second, *Gay* holds that a taxpayer's right to a refund of even unconstitutionally-imposed taxes accrues at the time the taxes are paid, rather than at the time that a tax statute is declared unconstitutional. This also strips a taxpayer from the "meaningful backward-looking relief" *McKesson* requires by insisting that a taxpayer seek a refund of taxes paid before the statute imposing the tax is ruled unconstitutional.

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[7]The rulings contained in *Gay* are otherwise mere *dicta* to the issue presented, which was simply when a taxpayer's right to a refund "accrued" as used in the statute.

[8]The Supremacy Clause dictates that the "decisions of the United States Supreme Court are binding on the courts of Florida." *Pignato v. Great Western Bank*, 664 So. 2d 1011, 1015 (Fla. 4th DCA 1995).

Kuhnlein, on the other hand, cites *McKesson*, and is in complete harmony with the Supreme Court opinion:

> The State next argues that the cause below is barred by the state's sovereign immunity, by an alleged common law rule that no one is entitled to the refund of an illegal tax, and by the requirements of Florida's refund statutes. Even if true, these are not proper reasons to bar a claim based on *constitutional* concerns. Sovereign immunity does not exempt the State from a challenge based on violation of the Federal or State Constitutions, because any other rule self-evidently would make constitutional law subservient to this State's will. Moreover, neither the common law nor state statute can supersede a provision of the federal or state constitutions.

Kuhnlein, 646 So.2d at 721 (emphasis in original).

These same constitutional predicates were at the root of the decisions in *McKesson, United States Shoe Corp., Bartlett* and *Alexander, supra*. *Kuhnlein* therefore parallels *McKesson* and these other cases. *Gay* and the Department, on the other hand, take solace in the rejected fiction that "the recovery of illegally exacted taxes is solely a matter of governmental grace." *Kuhnlein* must be held to recede from or overrule *Gay*.[9]

III. NEITHER THE CONSTITUTIONAL CLASS NOR THE GENERAL CLASS ARE SUBJECT TO THE PROCEDURES SET FORTH IN *FLA. STAT.* §215.26 BECAUSE, UNDER

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[9]Moreover, the Florida legislature has adopted *Kuhnlein* as a proper interpretation of *Fla. Stat.* §215.26(2) by enacting amendments to the Statute subsequent to *Kuhnlein* without changing the effect of the *Kuhnlein* rulings. *Davies v. Bossert*, 449 So. 2d 418 (Fla. 3d DCA 1984) ("because the legislature enacted only minor amendments to the statute . . . , it is presumed that it approved the interpretation given the earlier statute by the Florida Supreme Court.").

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THE CIRCUMSTANCES, ADMINISTRATIVE EXHAUSTION SHOULD BE EXCUSED.

In its Answer Brief, the Department does not dispute its endless denial that the Tire Dealers are entitled to a refund even had the procedure outlined in *Fla. Stat.* 215.26 been followed. Indeed, the Department now raises new, albeit barred reasons[10] why the Tire Dealers are not entitled to a refund. See Department's Corrected Answer Brief, at page 19. Rather, the Department dismisses the application of the Useless Act Doctrine on the basis that courts should not deem legislative procedures useless. The Department misapprehends the Tire Dealers' points. The Tire Dealers are not suggesting that *Fla. Stat.* §215.26 is useless in all cases where there is a dispute as to a taxpayer's liability. Instead, the Tire Dealers submit that the particular and unique history of this case represents the quintessential set of circumstances upon which the firmly-established Useless Act Doctrine should apply.

The Department not only fails in its Answer Brief to respond to the application of this Court's analysis in *Key Haven Assoc. Enterprises, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982)[11], but the Department also

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[10]See *State Department of Revenue v. J&B Operating Co., I, Inc.*, 663 So.2d 10 (Fla. 3d DCA 1995).

[11]The Department's failure to respond to many of the arguments advanced by the Tire Dealers, including this Court's opinion in *Key Haven*, is certainly not useful to the parties or this Court and

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overlooks a similarly detailed analysis offered by the United States Supreme Court in a case upon which it relies, *McCarthy v. Madigan,* 503 US 140, 112 S.Ct. 1081 (1992). In *McCarthy,* the Supreme Court explained three established circumstances in which a party may be excused from exhausting administrative remedies[12]:

> This Court's precedents have recognized at least three broad sets of circumstances in which the interests of the individual weigh heavily against requiring administrative exhaustion. First, requiring resort to the administrative remedy may occasion undue prejudice to subsequent assertion of a court action. Such prejudice may result, for example, from an unreasonable or indefinite time frame for administrative action. *Gibson v. Berryhill,* 411 U.S. 564, 575, n.14, 93 S.Ct. 1689, 1696, n.14 (1973)(administrative remedy deemed inadequate "[m]ost often... because of delay by the agency"). See also *Coit Independence Joint Venture v. FSLIC,* 489 US, at 587, 109, S.Ct., at 1376 ("because the Bank Board's regulations do not place a reasonable time limit on FSLIC's consideration of claims, Coit cannot be required to exhaust those procedures").

McCarthy, 503 U.S., at 146-147, 112 S.Ct., at 1087. Similarly, the Tire Dealers will and have suffered undue prejudice should they resort to the administrative remedies offered by *Fla. Stat.* §215.26. For example, *Fla. Stat.* §72.011 requires that the

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arguably concedes the merits of the Tire Dealers' arguments that have been ignored. See *American Baseball Cap, Inc. v. Duzinski,* 308 So. 2d 639, 640-641 (Fla. 1st DCA 1975).

[12]The refund application procedure set forth in Fla. Stat. §215.26(2) has consistently been recognized as falling within the doctrine of exhaustion of administrative remedies. *Florida Export Tobacco Co., Inc. v. Dept. of Revenue,* 510 So. 2d 936 (Fla. 1st DCA 1987); *Reynolds Fastners, Inc. v. Wright,* 197 So. 2d 295 (Fla. 1967); *State ex rel. Devlin v. Dickinson,* 305 So. 2d 848 (Fla. 1st DCA 1974).

Department promulgate rules regarding the time frame in which the Department has to respond to an application for refund. *Fla.Admin.Code* R. 3A-44.020(3) requires the Department "to promptly make a determination"[13] upon receipt of an application for refund. The reality leaves much to be desired. Miami Tiresoles, Inc. has now been waiting over 13 months for a decision from the Department as to its application for refund.

McCarthy also explains a second set of circumstances excusing administrative exhaustion:

> Second, an administrative remedy may be inadequate because of some doubt as to whether the agency was empowered to grant effective relief... For example, an agency, as a preliminary matter, may be unable to consider whether to grant relief because it lacks institutional competence to resolve the particular type of issue presented, such as the constitutionality of a statute... *Montana National Bank of Billings v. Yellowstone County, Mont.*, 276 U.S. 499, 505, 48 S.Ct. 331, 333 (1928) (taxpayer seeking refund not required to exhaust where "any such application [would have been] utterly futile since the county board of equalization was powerless to grant any appropriate relief" in face of prior controlling court decision).

McCarthy, 503 U.S. at 1479-1478, 112 S.Ct., at 1088. Likewise, and as the Department expressly recognizes, the it is impotent to pass upon the constitutional question presented in the Tire Dealers' claim for refund.

Finally:

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[13]Such an indefinite time in which to respond to an application falls far short of the "meaningful, clear; certain remedy" *McKesson* requires.

> Third, an administrative remedy may be inadequate where the administrative body is shown to be biased or has otherwise predetermined the issue before it. *Gibson v. Berryhill*, 411 US 564, 575 n.14, 93 S.Ct. 1689, 1696, n. 14 (1973); *Houghton v. Shafer*, 392 U.S. 639, 640, 88 S.Ct. 2119, 2120 (1968)(in view of Attorney General's submission that the challenged rules of the prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General "would be to demand a futile act").

McCarthy, supra, at 1088. This is precisely where the Tire Dealers find themselves here. The Department has undeniably predetermined the reasons submitted by the Tire Dealers for their entitlement to a refund. It has denied all of these reasons notwithstanding the trial and appellate courts' rulings in *J&B Operating Company, I, Inc.* Bearing in mind the Department's unequivocal position, to require the Tire Dealers to proceed through the administrative review process provided in *Fla. Stat.* 215.26, culminating in a decision by the Department not to refund the tax, would unquestionably require an unnecessary and futile act. [14]

IV. THE TIRE DEALERS PLAINLY HAVE STANDING TO BRING THIS ACTION BECAUSE THEY ARE REQUIRED PURSUANT TO THE WASTE TIRE FEE STATUTE TO REMIT THE FEE TO THE DEPARTMENT.

The Department argues that because the Tire Dealers are not parties to any of the state tire contracts, and because the fee was

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[14]An administrative remedy that is neither effective, available nor adequate is no administrative remedy at all. *Butler v. Dept. of Ins.*, 680 So. 2d 1103, 1107 (Fla. 1st DCA 1996).

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passed on to the State as part of the purchase price,[15] the Tire Dealers are without standing to seek a refund of the collected fee. The State Tire Contracts at issue were entered into between the State of Florida and Goodyear Tire Corp. of Akron, Ohio ("Goodyear"). Access to the rights and obligations of the state tire contracts was provided for all franchisees of Goodyear, like the Tire Dealers, and all agencies of the State of Florida, like the Department.

The Department did not assert lack of standing[16] when it audited J&B Operating Co., I., Inc. for its purported failure to pay the same Waste Tire Fee under a state tire contract. As a result of the audit, the Department issued a Notice of Assessment against J&B Operating Co., I., Inc. for fees, penalties and interest. (R. at 6 and A-1 at 5). This action signaled to other Goodyear franchisees that failure to remit the Waste Tire Fee as

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[15]The Department's disingenuous contention that because the bidding instructions for the 1992 and 1995 state tire contracts clearly informed that all bids necessarily included the Waste Tire Fee flies in the face of the statute itself, which mandates that such fee be separately line-itemed on all invoices to the purchasers. Any provision in the bidding instructions excusing compliance with the Waste Tire Fee is at best void and at worst unforceable as to the Tire Dealers.

[16]Indeed, the Department's failure to assert this argument when it had the opportunity precludes it under the doctrines of res judicata and collateral estoppel from now asserting the Tire Dealer's standing to challenge its payment of the Waste Tire Fee. *West v. Kawasaki Motors Manufacturing Corp.*, U.S.A., 595 So.2d 92 (Fla. 3d DCA 1992).

provided in *Fla. Stat.* §403.718 would result in penalties and interest.

Like J&B Operating Co., I., Inc. before them, the Tire Dealers face penalties for failure to pay the Waste Tire Fee. "The fact that these plaintiffs face penalties for failure to pay [the] taxes is sufficient to create standing under Florida law." *Kuhnlein, supra* at 720. If the Department had not attempted to subject J&B Operating Co., I., Inc. to the Waste Tire Fee, accompanying interest and penalties, and did not ignore the trial and appellate rulings in that case, and did not consistently assert that the Tire Dealers at bar were subject to payment of the Waste Tire Fee, this case would not exist. But the Department has done all of those things, making a mockery of its argument that the Tire Dealers lack standing.

CONCLUSION

The certified question must be answered in the affirmative and the certified conflict be resolved in favor of the Tire Dealers. Further, the Department's position with regard to the proper interpretation of *Fla. Stat.* 403.718 necessitates the application of the Useless Act Doctrine. As a result, both the Constitutional Class and the General Class should be excused from having to comply with the refund procedures set forth in *Fla. Stat.* 215.26, and the order appealed should be reversed with instructions to the trial court to allow the refunds claims to stand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy hereof was mailed on December 1, 1997 to Eric J. Taylor, Esq., Asst. Attorney General, Tax Section, Capitol Bldg., Tallahassee, FL 32399-1050.

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