IN THE
SUPREME COURT OF FLORIDA

Case No. SC01-351
L.T. Case No. 1D00-1335

MARC D. SARNOFF, TOM HYDE, STEVEN REGISTER, CHARLES STAHMAN, HARRY BRADY & MELISSA RICHIE, individually and on behalf of all others similarly situated,

Petitioners,

v.

STATE OF FLORIDA DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES, et. al.,

Respondents.

ON REVIEW FROM THE FIRST DISTRICT COURT OF APPEAL, STATE OF FLORIDA

REPLY BRIEF OF PETITIONERS

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I. The Department Seeks to Improperly Inject Evidentiary Hurdles Into Its Analysis Beyond the Scope of Rule 1.220.

The Department of Highway Safety and Motor Vehicles (the "Department") argues in its Answer Brief that the Petitioners, Marc D. Sarnoff, Tom Hyde, Steven Register, Charles Stahman, Harry Brady & Melissa Richie, individually and on behalf of all others similarly situated (the "Taxpayers"), have failed to meet some undefined evidentiary burden to demonstrate the futility of administrative processes in order to have filed their suit in circuit court. *Answer Brief 15, 16, Note 7*. The Department ignores the procedural posture that has brought the Taxpayers before this Court.

The circuit court order from which the Department took its appeal to the First District Court of Appeals was an interlocutory order granting the Taxpayers' class action status under Rule 1.220, Florida Rules of Civil Procedure. [A8]. Rule 1.220 does not require that the Taxpayers prove their case on the merits at the class certification hearing. Rather, the Taxpayers' evidentiary burden was to establish numerosity, commonality, typicality and adequacy of class representatives. The Department stipulated that the Taxpayers met all of these evidentiary issues. [A8 at p. 4]. Futility was not an evidentiary issue before the trial court. To the contrary, the Taxpayers had not taken even one deposition at the time of the circuit court's hearing.

II. The Department Improperly has Changed Its Argument on Appeal to Argue a New Issue Never Brought before the Trial Court or the District Court of Appeal.

The Department has always previously argued that the circuit court should have dismissed the suit for lack of jurisdiction because Taxpayers did not first seek a refund under section 215.26. The Department specifically argued to the trial court:

> [t]his Court has no jurisdiction over this case under the Florida Supreme Court's ruling in *Nemeth*. The Plaintiffs' sole basis of challenging is not the facial unconstitutionality of Sec. 325.214(2), Fla.Stat., but rather the invalid implementation of the law through a Departmental rule that makes the fee illegal. For this reason, the Plaintiffs cannot come to this Court seeking a class action under the *Nemeth* exception. The Plaintiffs must seek a refund under Sec. 215.26, Fla.Stat. The Court must deny the class certification request and dismiss this action.

[A6 at p. 28].[1]

The Department now appears to completely change the focus of its contention and argue, for the first time in its Answer Brief before this Court, that "the question is not whether a refund request made to the comptroller would be futile; the question is whether resort to the administrative process would have been futile. The answer is no." This argument is completely at odds with every other argument the Department has made at every stage of the proceedings below.

By way of example, in the Department's Amended Answer of the Defendant, Department of Highway Safety and Motor Vehicles to Plaintiffs' Amended Complaint ("Answer to the Complaint"), the Department contended "Plaintiffs each must meet the terms and conditions of Section 215.26, Florida Statutes." [A5 at p. 5]. Similarly, the Department's Answer to the Complaint in responding to Taxpayer's ad damnum clauses, states, "Thus, this Court has no jurisdiction over any claim for a refund until each and every plaintiff seeks and is denied a refund under Section 215.26, Florida Statutes." [A5 at p. 8, 9].

Similarly, the Department challenged whether the Taxpayers stated a cause of action by having not filed for claim refunds under section 215.26, in its defenses and

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[1] Because the Department's contention is, in actuality, that the circuit court erred in denying a motion to dismiss that the Department never filed, the First District Court of Appeal lacked subject matter jurisdiction over the appeal in the first instance. See, e.g., Mimms v. Cassidy, 550 So. 2d 162 (Fla. 1st DCA 1989) (an appellate court does not have interlocutory jurisdiction to review an order denying a motion to dismiss). Further, the mixture of an otherwise appealable issue (granting certification) with a non-appealable issue (denying dismissal) does not provide the appellate court with jurisdiction to review that which may not otherwise be appealed. R.D.&G Leasing, Inc. v. Stepnicki, 626 So. 2d 1002, 1003 (Fla. 3rd DCA 1993). See SCR 10 at Note 2.

affirmative defenses. [A5 at p. 11-13]. The Answer to the Complaint is devoid of any reference to alleged administrative remedies available to the Taxpayers other than to request a refund through the Comptroller in accord with section 215.26, Florida Statutes.

Likewise, the Department's Memorandum in Opposition to Plaintiffs' Motion for Class Certification argues that the circuit court "is without jurisdiction because the Plaintiffs have not complied with Section 215.26, Florida Statutes." [A6 at pp. 1, 10-11, 28]. The Department convinced the trial court that this was its argument. Specifically, the trial court stated within her order at issue, "the defendants argue that prior to reaching the Class Representation Allegations, this court must dismiss the plaintiff's claims for lack of jurisdiction, in light of Section 215.26, Florida Statutes." [A8 at p. 2].

This was the very same argument that the Department made in its Initial Brief before the First District Court of Appeals stating:

> the Appellees have simply failed to exhaust their administrative remedies under sec. 215.26, Fla.Stat. as required by Nemeth. This was the proper procedure and remedy to allow the Department to examine and, if necessary, correct the amount the Department charged for the inspection if the appellees could show that the fee was set too high.

[SCR 10 at p. 32].

Moreover, a review of the statutes to which the Department cited in its Initial Brief before the First District Court of Appeals (in the Table of Authorities at iv and v) reveals cites to various statutes in Chapters 325 and 215, Florida Statutes. It is nonetheless devoid of any cite to any statute within Chapter 120, let alone to section 120.56. [SCR 10 at p. iv, v]. The Department convinced the First District Court of

Appeals that their argument was based upon the Taxpayers' failure to exhaust administrative remedies under section 215.26. In that vein, the First District Court of Appeals stated in its opinion that, "[t]he Department further asserted the circuit court has jurisdiction of a refund case only after each person seeking a refund applies for a refund under section 215.26, Florida Statutes, and is denied same." [A9 at p. 4]. The First District Court of Appeals went on to hold "[p]ursuant to Nemeth, appellees were required to seek a refund under section 215.26, before filing suit in circuit court." [A9 at p. 12].

Before the Department's Answer Brief in this Court, the Department has always contended that the Taxpayers needed to file a claim for refund with the Comptroller in accord with section 215.26, Florida Statutes. The Department now improperly asserts that this is not the issue at all, but rather that this Court should examine whether the Taxpayers failed to exhaust other administrative remedies which may have been available. Although the Taxpayers must necessarily respond to the merits of this argument, the Taxpayers respectfully suggest that the Department has waived this argument by never having made it below. See, e.g., Mariani v. Schleman, 94 So. 2d 829, 831 (Fla. 1957) ("It is a rule of longstanding that on appeal this Court will confine itself to a review of those questions, and only those questions, which were before the trial court. Matters not presented to the trial court by the pleadings and evidence will not be considered by this court on appeal.").

Notwithstanding the legal infirmity of the Department's new argument on section 120.56, the Department's need to raise this issue demonstrates that section 215.26 provides the Taxpayers with no administrative remedy.

III. The Taxpayers Have No Remedy Under Section 215.26, Florida Statutes.

The Taxpayers' contend in Count I of their Amended Complaint that the Department knowingly set the fee at a level where it would generate revenue substantially in excess of the cost to administer and enforce the motor vehicle inspection program (the "Program"). The Taxpayers argue that the portion of the amount of the fee which the Department knowingly overcharged constituted a tax. The Department levied this tax in only 6 of 67 counties. The Department then used the revenues generated from this tax to fund its statewide operations in all 67 counties. The Taxpayers allege the Defendant's conduct violates the Florida and Federal Constitutions. The Taxpayers' claims are solely grounded in the constitutions.

Section 215.26, Florida Statutes, provides the Comptroller with the right to provide a refund in one of only three enumerated cases. These are: (i) overpayment; (ii) payment when no tax are due; and, (iii) payment made into the treasury in error. §215.26(1), Fla.Stat. As this Court noted in Nemeth, the Comptroller does not have the right under section 215.26, Florida Statutes, to refund taxes which might violate the constitution. Department of Revenue v. Nemeth, 733 So. 2d 970, 974 (Fla. 1999). The Department cites no authority to the contrary. Instead, the Department appears to contend that Nemeth and Kuhnlein have no applicability to the instant case because those cases deal with a tax statute, while the instant case deals with a fee.

However, Kuhnlein and Nemeth were not tax statutes, per se, but, rather, involved fee challenges (similar to the instant case). Moreover, as this very Court has noted on several occasions before, the charging entity's use of the word "fee" is not dispositive of whether the amount due is, in actuality, a fee or a tax. Rather, the Court

may look into the underlying economics and basis for the charges in determining whether the charging entity has, in fact, charged a fee or a tax. See, e.g., State v. City of Port Orange, 650 So. 2d 1, 3-4 (Fla. 1994) (finding the transportation utility fee was, in reality, an unconstitutional tax).

In the instant case, the Taxpayers seek the right to prove that the Department knowingly charged fees in excess of the cost to administer and enforce the Program. The Taxpayers further seek the right to prove that the Department charged excess fees solely to make up for general revenue shortfalls. If allowed to make this record, the fee at issue would surely meet the definition of tax in accord with the common law of Florida. See, e.g., Bateman v. City of Winterpark, 37 So. 2d 362, 363 (Fla. 1948) ("where the fee is exacted solely for revenue purposes, and payment of such fee gives the right to carry on business without the performance of any other conditions, it is a tax"); Broward County v. Janis Development Corp., 311 So. 2d 371 (Fla. 4th DCA 1975) (Fees in excess of cost to administer and enforce program constituted a tax).

Because of the procedural posture in which this case has made it before this Court, the allegations of Plaintiff's Amended Complaint should be deemed true for the purpose of analyzing whether there is a fee or tax at issue. Once the fees the Department has charged under Chapter 325 are recognized as a tax, then the case at bar fits squarely within the decision of this Court in Department of Revenue v. AmRep Corp., 358 So. 2d 1343 (Fla. 1978). At that point, the Taxpayers are permitted to bring their claim straight into circuit court without the need to pursue administrative remedies. See also WJA Realty Limited Partnership v. Department of Business Regulation, 620 So. 2d 217, 218 (Fla. 1st DCA 1993) (because pari- mutuel

taxes under Chapter 551, Florida Statutes, were not included in the concurrent jurisdiction provisions of section 72.011, the legality of the tax assessment remained within the exclusive jurisdiction of the Circuit Court in accord with section 26.012(2)(e), Florida Statutes, and article V, section 20(c)(3), Florida Constitution).

IV. To Require Taxpayers to Have Brought a Rule Challenge Under Section 120.56, Florida Statutes, is to Have Offered Taxpayers a Meaningless Remedy – Which Cannot Provide the Relief They Seek.

The Department notes that the adequacy and meaningfulness of the administrative process and procedures are the "keystones" of determining whether compliance with an administrative process would be futile. *Answer Brief at 13, Note 6* (*citing*, Gulf Pines Mem'l Park, Inc. v. Oaklawn Mem'l Park, Inc., 361 So. 2d 695 (Fla. 1978)).[2] The Taxpayers agree. To require the Taxpayers to institute a rule challenge proceeding under section 120.56, Florida Statutes, in order to exhaust administrative remedies, ignores economic practicality. When the aggrieved taxpayer has only been charged, individually $4.00, who could afford the counsel necessary to pursue this "administrative remedy"?

Moreover, Florida Marine Fisheries Comm'n v. Pringle, 736 So. 2d 17 (Fla. 1st DCA 1999) (a case upon which the Department relies), establishes why the doctrine of exhaustion of administrative remedies is inapplicable in the case at bar. In Pringle, the First District Court of Appeals stated "[t]he doctrine of exhaustion of administrative remedies precludes judicial intervention and executive branch decision making where administrative procedures can afford the relief a litigant seeks." Id. at 20 (emphasis supplied). The relief which Taxpayers seek in this case is a refund of

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[2] The Department relies upon this Court's Gulf Pines' decision. This decision is, however, at odds with the Department's contention that the Taxpayers' public policy arguments have no place before this Court. This Court in Gulf Pines stated, "the determination of whether the circumstances of a particular controversy warrant judicial intervention, then, is ultimately one of policy rather than power, and it is to that policy question that the First District Court of Appeal has addressed itself in Willis and Mitchell." Id. at 699.

that portion of the fee which constituted an unconstitutional tax to the persons who paid it. A rule challenge under section 120.56, Florida Statutes, does not provide this relief – it instead only provides a declaration of the invalidity of the rule. §120.56, Fla.Stat.

Finally, this Court has noted that where constitutional issues are so intertwined with administrative rule issues, it is appropriate, at times, to have all issues resolved in one judicial proceeding. See Department of Bus. & Prof. Reg. v. Ruff, 592 So. 2d 668 (Fla. 1991). In the case at bar, all of the Taxpayers' challenges to the motor vehicle inspection fees levied by the Department are grounded in the Florida and Federal Constitutions. The remedies which the Taxpayers seek are the return of the unconstitutionally collected taxes. The First District Court of Appeals affirmed two of the three counts brought by the Taxpayers (Counts II and III) and allowed them proceed before the circuit court. A review of the Amended Complaint reveals that the issues before the circuit court (Counts II and III) are completely common and intertwined with the issues within Count I of the Amended Complaint. Under these facts, it is appropriate to allow all three Counts to proceed together before the circuit court.

V. Conclusion.

The small individual amount at issue allows for no practical redress through the administrative process. The common fund class action remains the only practical remedy available when the government charges an unconstitutional tax which is individually de minimis, but substantial in the aggregate. The Taxpayers seek to use this remedy to obtain a refund of those taxes which the Department unconstitutionally

levied upon them.

For all the foregoing reasons, the Taxpayers request this Court quash the decision of the First District Court of Appeals and reinstate Count I of the Taxpayers' Amended Complaint as a class action as certified by the circuit court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND TYPEFACE COMPLIANCE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to: Eric J. Taylor, Esq., Asst. Attorney General, The Capitol, PL-01, Tallahassee, FL 32399-1050, this _____ day of August, 2002; and, that this Reply Brief uses the Times New Roman 14-point font.

Attorney

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