

1991

Wendell E. Brumley v. Utah Tax Commission : Unknown

Utah Supreme Court

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December 7, 1993

HAND-DELIVERED

FILED

DEC 7 1993

CLERK SUPREME COURT
UTAH

Geoffrey J. Butler
Clerk of the Court
Utah Supreme Court
332 State Capitol
Salt Lake City, UT 84114

Re: Wendell E. Brumley v. Utah State Tax Commission, No. 91-0242

Dear Mr. Butler:

I am writing pursuant to Rule 24(j) of the Utah Rules of Appellate Procedure to advise the Court of some recent authority that has come to the attention of counsel while awaiting the Court's decision on the Defendants/Appellants' Petition for Rehearing.

Point IV A of the Defendant's Petition for Rehearing (p. 4) and Point I of the Brief of Amicus Curiae argue that Utah law provides adequate pre-deprivation procedures consistent with the requirements of federal due process. The State would like to add the following cases recently decided by the Georgia Supreme Court in support of that argument:

Reich v. Collins, No. S92A0621, S92A0622 (Georgia, Dec. 2, 1993)
James B. Beam Distilling Co. v. Georgia, No. S93A1217, S93A1218 (Georgia, Dec. 2, 1993)

Neither of these cases are readily available, so I am enclosing copies of both. To put these cases in context, I would refer the Court to the earlier Georgia Supreme Court decision in Reich v. Collins, 422 So. E. 2d 846 (1992) (state refund statute does not apply to taxpayer who paid income taxes under statute subsequently declared to be unconstitutional) (copy enclosed).

Finally, Point IV C of Defendants/Appellants original brief in this matter argued that the Utah statute, if requiring a refund, should not be applied retroactively. This Court's recent decision in Labrum v. Utah State Board of Pardons, No. 920222 (Utah, Dec. 6, 1993) is relevant to this argument. The State will provide a copy of this case to Plaintiff/Cross-Appellants.

Thank you for your consideration of this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Clawson', with a long horizontal flourish extending to the right.

CAROL CLAWSON
Solicitor General

cc: Jack C. Helgesen, Richard W. Jones w/encl. (by fax and mail)
Governor Michael O. Leavitt, w/encl.

262 Ga. 625

REICH

v.

COLLINS, et al.

REICH

v.

COLLINS, et al.

Nos. S92A0621, S92A0622.

Supreme Court of Georgia.

Nov. 19, 1992.

Reconsideration Denied Dec. 17, 1992.

Taxpayer who paid state income taxes on federal military retirement benefits sought refund. The Superior Court, Clayton County, Kenneth Kilpatrick, J., denied refund, and appeal was taken. The Supreme Court, Clarke, C.J., held that taxpayer who paid state income taxes under statute subsequently declared to be unconstitutional or otherwise invalid was not entitled to refund.

Affirmed in part and reversed in part.

Sears-Collins, J., concurred in judgment only.

1. Courts ⇐100(1)

United States Supreme Court's *Davis* decision, holding that state may not exempt state retirement benefits from state income taxation while taxing federal retirement benefits, was retroactively applicable to case of retired military officer whose federal military retirement benefits had been taxed by state which exempted benefits paid to retired state employees.

2. Taxation ⇐1097

Taxpayer who paid state income taxes under statute subsequently declared to be unconstitutional or otherwise invalid was not entitled to refund; refund statute was applicable only where taxes were erroneously or illegally assessed under valid law. O.C.G.A. § 48-2-35(a).

1. This Code section permits the states to tax "pay or compensation for personal services as [a federal] officer or employee....if the taxation

3. Taxation ⇐1097

In cases in which taxing statute is declared unconstitutional or otherwise void, taxpayer must have made demand for refund at time tax is paid or at time his tax return is filed, whichever occurs last; failure to do so bars any future claim.

Carlton M. Henson, McAlpin & Henson, Atlanta, for Reich.

Michael J. Bowers, Atty. Gen., and Warren R. Calvert, Asst. Atty. Gen., Atlanta, for Collins.

CLARKE, Chief Justice.

We granted the appellant's application to appeal, OCGA § 5-6-35(a), to consider the issue of his entitlement to a refund of state income taxes paid on his federal military retirement benefits in view of the United States Supreme Court's decision in *Davis v. Michigan*, 489 U.S. 803, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989).

Former OCGA § 48-7-27 created an income tax exemption for retirement benefits paid by the State of Georgia to retired state employees. No such exemption existed for retirement benefits paid by the federal government to retired federal employees residing in Georgia. In *Davis v. Michigan*, supra, the United States Supreme Court held that Michigan's taxing scheme, which exempted from state income taxation all state retirement benefits, but taxed all federal retirement benefits, violated the constitutional principles of intergovernmental tax immunity, as well as 4 U.S.C. § 111.¹ Because the State of Michigan conceded that a refund would be due the taxpayer if the Court found its taxing scheme to be unconstitutional, it was not necessary for the Court to determine the merits of the taxpayer's claim for a refund. The case was remanded to the Michigan courts to comply with the Court's "mandate of equal treatment," *Davis*, 489 U.S. at 818, 109 S.Ct. at 1509, in determining

does not discriminate against the employee because of the source of the pay or compensation."

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whether the taxpayer was entitled to prospective relief from discriminatory taxation.

Following the decision in *Davis v. Michigan*, the Georgia legislature, in special session, repealed that portion of OCGA § 48-7-27 which granted retired state employees an exemption from income taxation on their retirement benefits. Shortly thereafter, appellant, a retired colonel in the United States Army, filed a claim with the appellee Department of Revenue for a refund of income taxes he had paid to the State of Georgia on his military retirement benefits. The Department denied his claim, and appellant brought this action pursuant to OCGA § 48-2-35.

The case came before the trial court on cross-motions for summary judgment. The trial court concluded that former OCGA § 48-7-27 violated the principles of *Davis v. Michigan*, supra, and partially granted the appellant's motion for summary judgment on this issue. However, after analyzing the case under *Chevron Oil v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), the trial court held that *Davis v. Michigan* should not be applied retrospectively. The trial court therefore concluded that the appellant was not entitled to a refund, and granted the appellee's motion for summary judgment in this regard.

The appellant concedes that if this court determines that he is entitled to a refund, he will be eligible only for the taxable years 1985 through 1988.

1. We agree with the trial court that the principles of *Davis v. Michigan* apply to this case.² However, we have determined that, with regard to the issue of retroactive application, the case must be analyzed under *James B. Beam v. Georgia*, 501 U.S. —, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991), rather than the test set out in *Chevron Oil*, supra.

In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984), the U.S. Supreme Court held that Hawaii's taxing scheme, which distinguished between imported and locally distilled alcohol products, violated the Com-

merce Clause. Following this decision, James B. Beam Distilling Company filed a suit for refund of taxes it had paid to the State of Georgia, claiming entitlement to the refund under *Bacchus*. In *James B. Beam v. State of Georgia*, 259 Ga. 363, 382 S.E.2d 95 (1989), this court recognized that Georgia's taxing scheme, which imposed a higher tax on alcoholic beverages imported into the state than on alcohol produced in this state, violated the principles of *Bacchus*, supra. However, analyzing the case under *Chevron Oil*, supra, we held that the trial court did not err in applying the *Bacchus* decision prospectively only. The U.S. Supreme Court granted certiorari to our decision in *Beam* and reversed, holding that *Bacchus* should have been applied retroactively to our decision in *Beam*.

The U.S. Supreme Court held that where, in a civil case such as *Bacchus*, it does not reserve the question of whether the holding should be applied retroactively, the decision "is properly understood to have followed the normal rule of retroactive application in a civil case," — U.S. at —, 111 S.Ct. at 2445, 115 L.Ed.2d at 490, and thus the decision is to be applied not only to the parties before it, but "to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitation." *Id.* — U.S. at —, 111 S.Ct. at 2443, 115 L.Ed.2d at 488. The Court held that it is error for a lower court to refuse to apply a rule of federal law retroactively after the case announcing it has already done so. *Id.* — U.S. at —, 111 S.Ct. at 2446, 115 L.Ed.2d at 491. The Court went on to distinguish between the issue of retroactivity where a federal law or constitutional question is raised, and the issue of remedies, "i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one." *Id.* — U.S. at —, 111 S.Ct. at 2443, 115 L.Ed.2d at 487. In the normal circumstance, the issue of retrospectivity, or choice of law, is a federal question, while the remedial inquiry is left to the states. *Id.* — U.S. at —, 111

² We note that the State did not appeal this

ruling by the trial court.

S.Ct. at 2443, 115 L.Ed.2d at 488. The Court stated, as a general guideline, that when it remands a case to a lower court for consideration of any remedial issues, this "necessarily implies" that the choice of law, or retroactivity, question has been decided, and that the Court will apply its decision not only to the parties before it, but retrospectively to all others not procedurally barred. *Id.* — U.S. at —, 111 S.Ct. at 2445-46, 115 L.Ed.2d at 490-491.³

The State's argument in the case before us is that because it cannot be determined from the Court's opinion in *Davis v. Michigan* that the case was remanded for consideration of remedial issues since Michigan had conceded that a refund was due the taxpayer, it cannot be concluded that the Supreme Court intended retroactive application of the *Davis* decision. We do not agree.

[1] As we read *Davis v. Michigan*, the Court applied its decision to the taxpayer before it. The State of Michigan conceded that if the Court found its taxing scheme to be unconstitutional, then, under state law, the taxpayer would be entitled to a refund. Once the Supreme Court determined that Michigan's taxing scheme was unconstitutional and applied that principle to the taxpayer, Michigan conceded that the taxpayer was entitled to a refund. It does not follow that if the Supreme Court had determined that its decision in *Davis* was to be

prospective only,⁴ and thus not applicable to the litigants before it, that the State of Michigan would have conceded the taxpayer was due a refund.

Further, the issue of whether *Davis v. Michigan* is to be applied retroactively is foreclosed by the Supreme Court's decision in *Barker v. Kansas*, — U.S. —, 112 S.Ct. 1619, 118 L.Ed.2d 243 (1992). In that case military retirees challenged the Kansas income taxation scheme which permitted taxation of federal retirement benefits while exempting from taxation state retirement benefits. The U.S. Supreme Court held that this case was controlled by *Davis v. Michigan*. The Court reversed and remanded to the lower court for a determination of the remaining issues, including the taxpayers' entitlement to refunds of taxes previously paid. As such, it is clear that the Court applied the decision of *Davis v. Michigan* retroactively to the litigants in *Barker*, just as the Court applied the *Bacchus* decision retroactively to the litigants in *James Beam*.⁵

We thus conclude that the trial court correctly held that OCGA § 48-7-27 violated the principles of *Davis v. Michigan*, but erred in holding that this case does not apply retroactively.

2. The issue of what remedy is to be afforded the appellant remains. This is a question of state law. *Beam*, supra, — U.S. at —, 111 S.Ct. at 2443, 115 L.Ed.2d

the civil context." *Beam*, — U.S. at —, 111 S.Ct. at —, 115 L.Ed.2d at 490.

3. The Court held in *Beam* that principles of "equality and stare decisis" prevail over the *Chevron Oil* analysis, *Beam*, — U.S. at —, 111 S.Ct. at 2446, 115 L.Ed.2d at 491, and that the need to ensure that the substantive law "will not shift and spring," *Id.* — U.S. at —, 111 S.Ct. at 2447, 115 L.Ed.2d at 493, limits the "possible applications of *Chevron Oil*." *Id.*

4. See *Beam*, — U.S. at —, 111 S.Ct. at 2443, 115 L.Ed.2d at 488 for a discussion of prospective application of court decisions. Under the Court's analysis, the prospective method of overruling cases does not apply the new rule to the parties in the case, but only uses the case as a vehicle for announcing a new rule of law. The principle of selective prospectivity, in which the new rule is applied to the litigants before the court, has been abandoned in the criminal context, see *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), and "appears never to have been endorsed [by the Court] in

5. We further note that the Virginia Supreme Court analyzed an identical tax issue under the principles of *Chevron Oil*, and determined that *Davis v. Michigan* is not to be applied retroactively. *Harper v. Virginia Dept. of Taxation*, 241 Va. 232, 401 S.E.2d 868 (1991). The U.S. Supreme Court granted certiorari as to this decision, vacated the judgment of the Virginia Supreme Court, and remanded for consideration in light of its decision in *James Beam*. — U.S. —, 111 S.Ct. 2883, 115 L.Ed.2d 1049 (1991). On remand the Virginia Supreme Court concluded that *James Beam* does not require retroactive application of *Davis v. Michigan*. 242 Va. 322, 410 S.E.2d 629 (1991). On May 18, 1992, the U.S. Supreme Court granted certiorari to that decision. — U.S. —, 112 S.Ct. 1934, 118 L.Ed.2d 541.

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CRUZ-PADILLO v. STATE

Ga. 849

Cite as 422 S.E.2d 849 (Ga. 1992)

at 488. As the Supreme Court stated in *Beam*, nothing deprives the State of its "opportunity to raise procedural bars to recovery under state law or demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided...." *Beam*, — U.S. at —, 111 S.Ct. at 2448, 115 L.Ed.2d at 494.

[2] OCGA § 48-2-35(a) provides, in part, that "[a] taxpayer shall be refunded any and all taxes or fees which are determined to have been erroneously or illegally assessed and collected from him *under the laws of this state*, whether paid voluntarily or involuntarily ..." (Emphasis supplied.) We hold that this statute contemplates the situation where a taxing authority erroneously or illegally assesses and collects a tax under a valid law. It does not address the situation where the law under which the taxes are assessed and collected is itself subsequently declared to be unconstitutional or otherwise invalid. This distinction is significant in that the State must be able to rely on the laws under which it assesses taxes in order to promote stable and efficient government. Furthermore, this protects the State against those instances in which a vendor/taxpayer has recouped its tax expense by passing it on to the consumer. See, e.g., *Atlanta Americana Motor Hotel Corp. v. Undercofler*, 222 Ga. 295(1), 149 S.E.2d 691 (1966); *Blackmon v. Premium Oil Stations, Inc.*, 129 Ga.App. 169, 198 S.E.2d 900 (1973); *Blackmon v. Ga. Independent Oilmen's Ass'n*, 129 Ga.App. 171, 198 S.E.2d 896 (1973). Were we to interpret the statute differently, the vendor/taxpayer would realize a windfall or double recovery not intended by the legislature.

Thus we conclude that the taxpayer is not entitled to a refund under the provisions of OCGA § 48-2-35(a).

[3] We take this opportunity to hold that in cases in which a taxing statute is declared unconstitutional or otherwise void, a taxpayer must have made a demand for refund at the time the tax is paid or at the time his tax return is filed, whichever occurs last. Failure to do so bars any future claim.

Judgment affirmed in part and reversed in part.

HUNT, BENHAM and FLETCHER, JJ., concur.

SEARS-COLLINS, J., concurs in the judgment only.

BELL, P.J., disqualified.



262 Ga. 629

CRUZ-PADILLO

v.

The STATE.

No. S92A0629.

Supreme Court of Georgia.

Nov. 19, 1992.

Reconsideration Denied Dec. 17, 1992.

Defendant was convicted in the Superior Court, Clayton County, William H. Ison, J., of felony-murder, voluntary manslaughter, aggravated assault, and possession of a firearm during commission of a felony. Defendant appealed. The Supreme Court, Bell, P.J., held that: (1) evidence sustained conviction for felony-murder; (2) defendant was barred from asserting that court should have sentenced him for felony manslaughter instead of felony-murder because of his failure to object; (3) trial court's violation of defendant's rights to remain silent and to due process was harmless error; and (4) any error in trial court's ruling that defendant could not introduce evidence of victim's reputation for violence was not subject to reversal because defendant made no offer of proof.

Affirmed.

1. Homicide ⇐235

Evidence sustained conviction for felony-murder; defendant motioned for vic-



MICHAEL J. BOWERS
ATTORNEY GENERAL

The Department of Law
State of Georgia
Atlanta

30334

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In the Supreme Court of Georgia

Decided: DEC 2 1993

S92A0621. REICH v. COLLINS, et al.
S92A0622. REICH v. COLLINS, et al.

CLARKE, Chief Justice.

In Reich v. Collins, 262 Ga. 625 (422 SE2d 846) (1992) (Reich v. Collins I), we were faced with the issue of whether appellant Reich was entitled to a refund of state income taxes paid on his federal military retirement benefits in view of the decision of the United States Supreme Court in Davis v. Michigan, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989). The latter case held that a state taxing scheme which exempts state retirement benefits from state income taxation but does not so exempt federal retirement benefits violates the United States Constitution.¹ The initial issue to be determined in Reich v. Collins I was whether Davis v. Michigan should be applied retrospectively to Reich's claim. We held that, under recent decisions of the United States Supreme Court, retrospective application was required, but ultimately concluded that state law barred Reich's claim to a refund under OCGA 48-2-35 (a).

¹ Former OCGA 48-7-27 created a state income taxing scheme, a portion of which was unconstitutional under the authority of Davis v. Michigan. After the U.S. Supreme Court decided Davis, the Georgia legislature repealed the unconstitutional provisions of the code section.

The U.S. Supreme Court subsequently granted Reich's petition for certiorari. That Court vacated the judgment in Reich v. Collins I, and remanded the case to us "for further consideration in light of Harper v. Virginia Department of Taxation," 509 U.S. ____ (113 SC 2510, 509 LE2d ____) (1993).

In Harper, the United States Supreme Court reversed a decision of the Virginia Supreme Court which held that the appellants in that case were not entitled to refunds of state income taxes because Davis v. Michigan should be applied prospectively only. The U.S. Supreme Court initially determined that Davis v. Michigan applies retrospectively. It then remanded Harper to the Virginia Supreme Court to follow the Constitutional mandate of providing relief "consistent with federal due process principles." Harper, 113 SC at 2519.

Due process requires that a state provide procedural safeguards against the unlawful exactions of taxes, McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18 (110 SC 2238, 2250, 100 LE2d 148) (1990), but the state retains some flexibility in the type safeguards it must provide. Harper, supra, 113 SC at 2519; James B. Beam Distilling Co. v. The State of Georgia, S93A1217, (Decided December ___, 1993). In remanding Harper, the United States Supreme Court held that

If Virginia 'offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard...sufficient by itself to satisfy the Due Process Clause.' [citing McKesson Corp v. Division of Alcoholic Beverages & Tobacco, 496 U.S. 18, 38, n. 21].... On the other hand, if no such

predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.' 113 SC at 2519.²

In the first division of Reich v. Collins I, we held, consistent with Harper v. Virginia, that Davis v. Michigan must be applied retrospectively. Because the U.S. Supreme Court has vacated our judgment in that case, we expressly incorporate Division One of Reich v. Collins I into this opinion. We therefore conclude that our duty on remand is to determine whether Georgia law provided a predeprivation remedy to Reich sufficient to satisfy the requirements of federal due process as set out in Harper and McKesson, supra. While the selection of a remedy to be afforded is an issue of state law, James B. Beam Distilling Co. v. Georgia, 501 U.S. ____ (111 SC 2439, 115 LE2d 481, 488) (1991), this remedy must satisfy "minimum federal requirements." Harper, supra, 113 SC at 2520.

We have recently held in James B. Beam Distilling Co. v. The State of Georgia, S93A1217, supra, that the declaratory judgment remedies under OCGA 9-4-1 et seq., as well as statutory injunctive relief remedies available provide meaningful opportunities to taxpayers to litigate the validity of taxes alleged owing prior to the time when the taxes fall due.³ As such, these remedies are of

² In McKesson the Court suggested that "meaningful, backward-looking relief" could include a refund, Id. at 2251, or the assessment and collection of back taxes from those who received favored treatment in violation of the Constitution, Id. at 2252.

³ In McKesson, supra, 110 SC at 2250, the Court held that "[t]he State may choose to provide a form of 'predeprivation process,' for example by authorizing taxpayers to bring suit to

themselves sufficient to satisfy federal due process requirements.⁴

Additionally, there are predeprivation remedies under the Georgia Administrative Procedure Act of which a taxpayer may avail himself when making a constitutional challenge to a state tax. Under OCGA 50-13-12, a taxpayer who is aggrieved by "any act" of the Department of Revenue "in a matter involving....liability for taxes," is entitled to a hearing before the Department. OCGA 50-13-19 and OCGA 5-13-20 provide for judicial review to a taxpayer dissatisfied with a decision by the Department of Revenue in a case brought under OCGA 50-13-12.

Further, pursuant to OCGA 48-2-59, a taxpayer may appeal an assessment by the Department of Revenue directly to the superior court, without the necessity of an administrative hearing.

We conclude that there are ample predeprivation remedies under Georgia law available to a taxpayer who seeks to challenge an allegedly unconstitutional tax. These remedies satisfy the requirements of federal due process as set forth in McKesson and Harper, supra. Consequently, Reich's due process rights have not been violated by the Department's failure to refund to him that portion of income taxes paid in violation of Davis v. Michigan.

Judgment affirmed in part and reversed in part. All the Justices concur except Sears-Collins and Carley, JJ., who dissent.

enjoin imposition of a tax prior to its payment..."

⁴ Reich maintains that these are not viable remedies because his lawsuit seeking a declaratory judgment that the tax at issue in this case was unconstitutional was dismissed by the superior court. However, Reich did not appeal that decision.

S93A0621, S93A0622. REICH v. COLLINS et al.

CARLEY, Justice, dissenting.

Former OCGA § 48-7-27 provided that state retirement benefits were exempt from income taxation by the State, but that federal retirement benefits were not. However, the unconstitutionality of this former provision was established by the holding in Davis v. Michigan, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989). The mandate of Davis is to be applied retroactively, rather than prospectively. Harper v. Va. Dept. of Taxation, 509 U.S. ____ (113 SC 2510, 125 LE2d 74) (1993). Appellant is a Georgia taxpayer who seeks a refund of income taxes that he previously paid to the State pursuant to the unconstitutional provisions of former OCGA § 48-7-27. There is no question of appellant's standing to seek such a refund. Compare James B. Beam Distilling Co. v. State of Ga., ____ Ga. ____ (Case Number S93A1217, decided December __, 1993). However, the majority nevertheless holds that appellant is not entitled to seek a refund because federal due process has otherwise been satisfied. In my opinion, appellant is entitled to the refund that he seeks and I must, therefore, dissent.

Where, as here, a taxpayer seeks a refund of state taxes that he has paid pursuant to a statute which is in contravention of the federal constitution, "[s]tate law may provide relief beyond the

demands of federal due process, [cit.], but under no circumstances may it confine [the taxpayer] to a lesser remedy, [cit.]." Harper v. Va. Dept. of Taxation, supra at __ (III). The minimum parameters of federal due process are clear. If a State has offered "'a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing,' the 'availability of a predeprivation hearing constitutes a procedural safeguard ... sufficient by itself to satisfy the Due Process Clause.' [Cit.] On the other hand, if no such predeprivation remedy exists, 'the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.' [Cit.] In providing such relief, a State may either award full refunds to those burdened by the unlawful tax or issue some other order that 'create(s) in hindsight a nondiscriminatory scheme.' [Cit.]" Harper v. Va. Dept. of Taxation, supra at __ (III). In responding to the unconstitutionality of former OCGA § 48-7-27, Georgia did not create "in hindsight a nondiscriminatory scheme" by assessing and collecting back income taxes from those taxpayers whose state retirement benefits had previously been exempted from taxation. See McKesson v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 40 (III) (B) (110 SC 2238, 100 LE2d 148) (1990). Georgia merely repealed the unconstitutional provisions of that former statute. Accordingly, appellant is constitutionally entitled to a refund unless he had available to him at the time that he paid the taxes a meaningful opportunity to

withhold their payment and to challenge their validity in a predeprivation hearing. "[I]f a State chooses not to secure payments under duress and instead offers a meaningful opportunity for taxpayers to withhold contested tax assessments and to challenge their validity in a predeprivation hearing, payments tendered may be deemed 'voluntary.' ... '(W)here voluntary payment (of a tax) is knowingly made pursuant to an illegal demand, recovery of that payment may be denied.'" McKesson v. Div. of Alcoholic Beverages and Tobacco, supra at 38 (III) (B), fn. 21. The issue for resolution is, therefore, whether appellant paid the unconstitutional taxes "voluntarily" or under "duress."

In my opinion, nothing under the specific provisions of the state tax code can be said to have provided appellant with the opportunity for a constitutionally meaningful predeprivation challenge to his payment of taxes pursuant to the unconstitutional provisions of former OCGA § 48-7-27. The majority cites OCGA § 48-2-59 as affording appellant such an opportunity. Subsection (a) of that statute does provide generally for an "appeal from any order, ruling, or finding of the commissioner to the superior court...." However, subsection (c) further provides that, in order to secure review by the superior court, the taxpayer must file a surety bond or other security "conditioned to pay any tax over and above that for which the taxpayer has admitted liability and which is found to be due by a final judgment of the court, together with interest and costs." By conditioning the taxpayer's right to appeal upon the posting of "a surety bond or other security," OCGA § 48-2-59 does

not, in my opinion, satisfy "'the root requirement" of the Due Process Clause ... "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest,"' [cit.]...." (Emphasis in original.) McKesson v. Div. of Alcoholic Beverages and Tobacco, supra at 37 (III) (B). To the contrary, that statute is merely one of the "various sanctions and summary remedies [contained in the tax code which are] designed so that [taxpayers] tender tax payments before their obligations are entertained and resolved." (Emphasis in original.) McKesson v. Div. of Alcoholic Beverages and Tobacco, supra at 38 (III) (B).

Thus, I cannot agree with the majority that OCGA § 48-2-59 satisfies minimum federal due process requirements such that appellant's failure to have resorted thereto renders his payment of the unconstitutional state income taxes "voluntary" and non-refundable. "A State that 'establish(es) various sanctions and summary remedies designed' to prompt taxpayers to 'tender ... payments before their objections are entertained or resolved' does not provide taxpayers 'a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's validity.' [Cit.] Such limitations impose constitutionally significant '"duress"' because a tax payment rendered under these circumstances must be treated as an effort 'to avoid financial sanctions or a seizure of real or personal property.' [Cit.] The State accordingly may not confine a taxpayer under duress to prospective relief." (Emphasis in

original.) Harper v. Va. Dept. of Taxation, supra at __ (III), fn. 10.

The majority also finds that the Administrative Procedure Act (APA) afforded appellant a constitutionally meaningful predeprivation remedy for contesting his payment of the unconstitutional taxes. Subsection (a) of OCGA § 50-13-12 does provide that the "Department of Revenue shall hold a hearing upon written demand therefor by any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes...." However, appellant was not "aggrieved by any act of the department," but by an allegedly unconstitutional act of the legislature. Even assuming that the department would have had initial jurisdiction under the APA to entertain a challenge to the constitutionality of former OCGA § 48-7-27, such a challenge would be "futile at the time of its making." Flint River Mills v. Henry, 234 Ga. 385, 386 (216 SE2d 895) (1975). Thus, to secure a ruling on the constitutionality of former OCGA § 48-7-27 pursuant to the APA, appellant would presumably have been required to undergo an entirely "futile" hearing before the department and then incur the additional expenditure of time and money pursuing an appeal to the superior court. The availability of such an attenuated process cannot, in my opinion, be deemed to have provided appellant "with all of the [predeprivation] process [he] is due: an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any ...

[pre]deprivation of property." McKesson v. Div. of Alcoholic Beverages and Tobacco, supra at 40 (III) (B).

Moreover, nothing in OCGA § 50-13-12 authorizes the taxpayer to withhold his taxes pending resolution of his purported administrative remedy and compels the department to forego the various sanctions and summary remedies that it is otherwise authorized to employ against the taxpayer under the tax code. Subsection (c) of that statute merely provides that, pending the hearing and decision, the department "may suspend or postpone the effective date of its previous action." (Emphasis supplied.) Thus, "[a] taxpayer who chooses [the administrative] remedy ... is subject to the discretion of the commissioner and/or reviewing court as to whether collection procedures will be stayed ([cit.])." Gainsville-Hall County Economic Opportunity Org., Inc. v. Blackmon, 233 Ga. 507, 508 (I) (212 SE2d 341) (1975). Since the administrative remedy relied upon by the majority does not clearly protect the taxpayer against the department's employment of its various sanctions and summary remedies designed to encourage timely payment prior to resolution of the dispute, I cannot agree with the majority's conclusion that that remedy satisfies the minimum requirements of federal due process. "We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure. [Cits.]" McKesson v. Div. of Alcoholic Beverages and Tobacco, supra at 38 (III) (B), fn. 21.

The majority also relies upon the Declaratory Judgment Act as affording appellant a constitutionally meaningful predeprivation remedy. However, there is considerable doubt whether any general remedial statute, such as a declaratory judgment act, can ever be considered to be an available "clear and certain remedy" such that a taxpayer's failure to have invoked those provisions can be deemed to evidence his "voluntary" payment of unconstitutional taxes. As I understand the mandate of the controlling decisions of the Supreme Court of the United States, the determination of the availability of a taxpayer's "clear and certain" predeprivation remedy should be confined to a consideration of the specific tax structure enacted by the State, and not be based upon the existence of general remedies which, with the benefit of hindsight, can be urged to have otherwise been available to the taxpayer. See Harper v. Va. Dept. of Taxation, *supra*, and McKesson v. Div. of Alcoholic Beverages and Tobacco, *supra*, neither of which discuss the availability of general, rather than specific, taxpayer relief. Confining our inquiry to the specific statutes, such as OCGA § § 48-2-59 and 50-13-12, which do relate to the resolution of tax disputes, it is clear to me that Georgia has established "various sanctions and summary remedies designed so that [taxpayers] tender tax payments before their objections are entertained and resolved. As a result, [Georgia] does not purport to provide taxpayers like [appellant] with a meaningful opportunity to withhold payment and to obtain a predeprivation determination of the tax assessment's

validity...." (Emphasis in original.) McKesson v. Div. of Alcoholic Beverages and Tobacco, supra at 38 (III) (B).

In any event, I cannot agree with the majority's conclusion that the Georgia Declaratory Judgment Act can be considered to be such a "clear and certain remedy" that appellant's failure to have invoked its provisions evidences his "voluntary" payment of the unconstitutional taxes. As is true in the case of the administrative remedy, there is nothing in our Declaratory Judgment Act which authorizes the taxpayer to withhold his taxes pending resolution of his claim or which compels the department to forego employment of the various sanctions and summary remedies that it is otherwise authorized to pursue under the tax code. The trial court is authorized to grant the taxpayer injunctive relief, but the exercise of that authority is discretionary and a taxpayer cannot, therefore, be assured that the department's collection procedures will be stayed. Since the declaratory judgment remedy advanced by the majority does not clearly protect the taxpayer against the department's employment of its various sanctions and summary remedies which are otherwise designed to encourage timely payment of taxes prior to resolution of the dispute, I cannot agree with the majority's conclusion that that remedy satisfies the minimum requirements of federal due process.

For all the reasons stated, I believe that appellant's payment of the unconstitutional taxes was not made "voluntarily," but was made under "duress." I believe, therefore, that the majority opinion erroneously "confine[s] [appellant] to a lesser remedy"

than that which federal due process demands. Harper v. Va. Dept. of Taxation, supra at __ (III). Accordingly, I must respectfully dissent to the majority's failure to afford appellant the "meaningful backward-looking relief" of the refund to which he is constitutionally entitled. Harper v. Va. Dept. of Taxation, supra at __ (III).

I am authorized to state that Justice Sears-Collins joins in this dissent.



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In the Supreme Court of Georgia

Decided: DEC 2 1993

S93A1217, S93A1218. JAMES B. BEAM DISTILLING CO. v. STATE OF
GEORGIA et al. (two cases)

BENHAM, Justice.

Appellant James B. Beam Distilling Company (Beam) brought this action seeking a refund for taxes paid pursuant to OCGA § 3-4-60¹ in 1982-1984. See OCGA § 48-2-35. The trial court's decision that OCGA § 3-4-60 violated the Commerce Clause of the United States Constitution was affirmed by this court, as was the trial court's determination that the ruling was to be applied prospectively only. James B. Beam &c. v. State of Georgia, 259 Ga. 363 (382 SE2d 95) (1989) ("Beam I"). After granting Beam's application for certiorari, the Supreme Court of the United States ruled that its

¹The statute was amended in 1985 after the United States Supreme Court found a similar statute from Hawaii to be an unconstitutional violation of the Commerce Clause (Bacchus Imports v. Dias, 468 U.S. 263 (104 SC 3049, 82 LE2d 200) (1984)), and the amended statute has withstood constitutional challenge. See Heublein, Inc. v. State of Georgia, 256 Ga. 578 (351 SE2d 190) (1987).

decision in Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (104 SC 3049, 82 LE2d 200) (1984), was applicable retroactively to Beam's claims that arose on facts antedating the Bacchus decision, and remanded the case for determination of remedial issues. James B. Beam Distilling Co. v. Georgia, 501 U.S. ____ (111 SC 2439, 115 LE2d 481) (1991). We, in turn, remanded the case to the trial court which granted summary judgment to appellee after concluding, based on three independent grounds, that appellant was not entitled to a refund of the 1982-84 taxes. The appeal in S93A1217 is from the trial court's denial of summary judgment TO Beam and the grant of summary judgment to the State on Beam's original complaint. The appeal in S93A1218 is from the trial court's denial of summary judgment to Beam on the allegations raised in the first and second amendments to its complaint, and the grant of summary judgment to the State on the amendments.

1. After our remand to the trial court, appellant amended its complaint to seek a judicial determination that OCGA § 48-2-35 (the refund statute) was applicable to appellant and that the 1992 amendment to OCGA § 3-2-14 (a) was unconstitutional as applied to Beam; and to assert a claim under 42 USC § 1983 and a concomitant claim for attorney fees under 42 USC § 1988. The State amended its answer to assert several additional defenses, including the assertion that appellant did not have standing to seek a refund under OCGA § 48-2-35.² We entertain the State's standing argument

²The U.S. Supreme Court invited the State to invoke, on remand, independent procedural bases for its refusal to provide a refund. See Beam Distilling Co. v. Georgia, supra, 111 SC 2439,

because the consideration of a remedy "may well be ... obviated by issues of state law." Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 277 (104 SC 3049, 82 LE2d 200) (1984).³

2. "A particular remedy is not available to a party who has no entitlement to the right sought to be secured." Ragsdale v. New England Land &c. Corp., 250 Ga. 233 (1) (297 SE2d 31) (1982). In cases involving the Georgia sales and use tax (OCGA § 48-8-30 et seq.), the appellate courts of this State have repeatedly held that the payer of taxes to the State, while technically a "taxpayer" under § 48-2-35, does not have standing to file a claim for refund of taxes illegally collected or erroneously paid if the party remitting the taxes passed the tax on to its customers. Eimco BSP Services Co. v. Chilivis, 241 Ga. 263 (244 SE2d 829) (1978); Atlanta Americana Motor Hotel Corp. v. Undercofler, 222 Ga. 295 (1) (149 SE2d 691) (1966); Blackmon v. Ga. Ind. Oilmen's Assn., 129 Ga. App. 171 (3) (198 SE2d 896) (1973); Blackmon v. Premium Oil Stations, Inc., 129 Ga. App. 169 (2) (198 SE2d 900) (1973). If the remitting party did not bear the burden of the tax, it is not entitled to bring a suit to recover a refund of any overpayment.

In the case at bar, the applicable version of OCGA § 3-4-60 (1) levied and imposed an excise tax on alcohol and distilled

2448.

³For purposes of this appeal, we assume that OCGA § 48-2-35 may be an appropriate means by which one may seek a refund of taxes paid pursuant to a statute subsequently declared unconstitutional. See State of Georgia v. Private Truck Council &c., 258 Ga. 531 (371 SE2d 378) (1988). But see Reich v. Collins, 262 Ga. 625 (422 SE2d 826) (1992).

spirits imported into Georgia. By requiring the stamps denoting payment of the tax to be affixed by the manufacturer or the wholesaler to each bottle or container of distilled spirits before shipment to any retailer (OCGA § 3-4-61 (2) (1982)), the General Assembly expressed its intent that the excise tax be paid before the product was made available for purchase by the consuming public.⁴ Where a wholesaler is a link in the chain of delivery of the product to the retailer, it is essential that the excise tax be paid by the time the product leaves the wholesaler.⁵ Where, as here, the manufacturer remits tax payment to the revenue commissioner and subsequently, in an itemized billing statement, requires the wholesaler to remit payment for "state stamps" or "state tax," it is the wholesaler which is the taxpayer for purposes of OCGA § 48-2-35.⁶ Due to its lack of standing, appellant is procedurally barred from pursuing an action for refund under OCGA § 48-2-35.

3. Even assuming that appellant was not procedurally barred from seeking a refund under § 48-2-35, federal due process, as

⁴Stamps denoting the payment of the excise tax were required to be affixed to each bottle or container of distilled spirits. OCGA § 3-4-61 (1982). Effective February 1, 1993, the revenue commissioner is required to adopt rules and regulations eliminating the use of a stamp in the payment of the excise tax on distilled spirits and alcohol. See OCGA § 3-4-61 (1992).

⁵In 1992, the legislature amended OCGA § 3-4-61 to state explicitly that the excise tax was to be paid by the wholesale dealer. OCGA § 3-4-61 (a) (1992).

⁶Credits or refunds issued in the discretion of the revenue commissioner under OCGA § 3-2-13 to a manufacturer are statutorily required to be refunded or credited to the wholesaler, the party who actually paid the tax.

interpreted by the Supreme Court in McKesson Corp. v. Fla. Alcoholic Beverages and Tobacco Div., 496 U.S. 18 (110 SC 2323, 110 LE2d 148) (1990), and elaborated upon in Harper v. Virginia Dept. of Taxation, 509 U.S. (113 SC 2510, 509 LE2d) (1993), does not require that the State of Georgia refund to appellant the discriminatory portion of the excise taxes appellant remitted in 1982-1984 pursuant to OCGA § 3-2-60.⁷

A governmental requirement that one pay a tax deprives the payor of property, and such a deprivation mandates compliance with the Due Process Clause of the Constitution of the United States. Due process requires a government to have procedural means by which the taxpayer may safeguard against unlawful exactions. McKesson, 110 SC 2238, supra, at 2250. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" [Cits]."
Mathews v. Eldridge, 424 U.S. 319, 333 (96 SC 893, 47 LE2d 18) (1976). While due process generally requires that the hearing be held prior to the deprivation, the Court, recognizing that the exaction of taxes is the lifeblood of a governmental entity, has permitted governments to exact taxes and require the taxpayer to voice objections to the tax thereafter. Should the governmental entity so procedurally limit itself, it

⁷Appellant contends that our statement in Beam I, 259 Ga. 363, at 365, that the State would have to refund monies should the Bacchus decision be applied retroactively is a conclusive admission that refunds are due now that the U.S. Supreme Court has decided the retroactivity issue adversely to the State. Beam, 501 U.S. . In so relying on the statement, appellant has taken it out of its context, a discussion of the equities of retroactivity under the analysis set forth in Chevron Oil v. Huson, 404 U.S. 97 (92 SC 349, 30 LE2d 296) (1971).

must provide "meaningful, backward-looking relief to rectify any unconstitutional deprivation." McKesson, supra, at 2247. However, should the government provide a procedure through which the taxpayer may challenge the validity of the taking prior to the deprivation, the Due Process Clause is satisfied. Id., at 2251, n.21. Thus, before attempting to fashion a post-deprivation, meaningful, backward-looking remedy,⁸ we must determine the state law question of whether Georgia law "provides an adequate form of predeprivation process...." Harper v. Va. Dept. of Taxation, 113 SC 2510, supra, at 2520.

4. In its discussions on the topic, the U.S. Supreme Court illustrates "predeprivation process" as that which authorizes taxpayers to bring suit to enjoin imposition of a tax prior to its payment, or that which permits taxpayers to withhold contested tax assessments and challenge their validity in a predeprivation hearing. McKesson, supra, at 2250 and 2251, n.21. In Georgia, a taxpayer who fails to pay taxes due is subject to being named a defendant in an action brought by the revenue commissioner to collect the amount due. OCGA § 48-2-54. In such an action, the taxpayer would have the opportunity to challenge the validity of the imposition of the contested taxation prior to paying the tax. That the Commissioner is statutorily authorized to seek penalties

⁸The U.S. Supreme Court has consistently left it to the States to craft an appropriate post-deprivation remedy. See e.g., Harper v. Va. Dept. of Taxation, supra; James B. Beam Distilling Co. v. Ga., supra; McKesson v. Fla. Alcoholic Beverages &c., supra; Davis v. Michigan, 489 U.S. 803 (109 SC 1500, 103 LE2d 891) (1989); and Bacchus Imports v. Dias, supra.

is not a financial sanction tantamount to an attempt to secure payment of taxes under duress (see McKesson, supra, at 2251, n.21, and Harper, supra, at 2519, n. 10) since the penalties are subject to waiver by the revenue commissioner upon a determination that the taxpayer's default was the result of reasonable cause and was not due to gross or willful neglect or disregard of the law or regulations. OCGA § 3-2-12.

5. In addition, Georgia statutes make declaratory judgment relief available prior to payment of disputed taxes "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations..." (OCGA § 9-4-1), and such relief is available even if the party has other adequate legal or equitable remedies. OCGA § 9-4-2 (c).

The Declaratory Judgment Act is an alternative or additional remedy to facilitate the administration of justice more readily ... [and is] intended to give additional protection to a person who may become involved in an actual justiciable controversy.... [Shippen v. Folsom, 200 Ga. 58, 68 (35 SE2d 915) (1945)].

Another intended purpose of declaratory judgment is "to afford a speedy and inexpensive method of adjudicating legal disputes." Clein v. Kaplan, 201 Ga. 396, 404 (40 SE2d 133) (1946). In furtherance of this goal, the Declaratory Judgment Act empowers the superior court in which a petition for declaratory judgment is filed to grant injunctive or other interlocutory extraordinary relief in connection with the petition. OCGA § 9-4-3 (b); see also OCGA § 9-11-65 (b). Thus, a petition may be filed seeking a judgment declaring a statute or ordinance unconstitutional and praying for an injunction against the enforcement of the questioned

law. See e.g., Gravelly v. Bacon, 263 Ga. 203 (429 SE2d 663) (1993); State of Georgia v. Private Truck Council &c., 258 Ga. 531 (371 SE2d 378) (1988); City of Atlanta v. Spence, 242 Ga. 194 (249 SE2d 554) (1978); State of Georgia v. Golia, 235 Ga. 791 (222 SE2d 27) (1976).⁹ Should the party seeking relief be threatened with immediate and irreparable injury, loss, or damage, the party may apply immediately for a temporary restraining order. OCGA § 9-11-65 (b). When tax statutes have been the subject of a declaratory judgment action, the trial court has exercised its discretion to establish escrow funds for payment of the disputed taxes should the taxpayer choose to tender payment. See Collins v. Waldron, 259 Ga. 582 (385 SE2d 74) (1989); State of Georgia v. Private Truck Council, supra, at Div. 4. In sum, a taxpayer who wishes to challenge the validity of a statute that imposes a duty upon him to pay a tax may do so prior to paying the disputed tax, and has recourse to judicial remedies to enjoin collection of the contested tax pending final determination of his judicial challenge to the statute.

6. Finally, within the Georgia Alcoholic Beverage Code (OCGA §§ 3-1-1 et seq.) there is in place the means by which appellant, as a licensed wholesale dealer (see OCGA § 3-1-2 (23)), could receive administrative review, complete with notice and a hearing,

⁹In point of fact, in 1985, several of appellant's attorneys, then representing an importer of alcoholic beverages, filed an action against Georgia's taxing authorities in which they sought a declaratory judgment that a taxing statute was unconstitutional and an injunction against its enforcement. See Hublein, Inc. v. State of Georgia, 256 Ga. 578 (351 SE2d 190) (1987).

of the commissioner's determination that appellant had not remitted the "proper amount of taxes." OCGA § 3-2-11 (2). Under this scheme, appellant could remit the non-discriminatory portion of its tax assessment and attack the taxing statute in the administrative hearing held to determine the amount due. The notice and hearing provisions of the Georgia Administrative Procedure Act (OCGA § 50-13) are incorporated into the procedure for assessment of taxes due in OCGA § 3-2-11 (2). Furthermore, within the APA there is a section exclusively devoted to the hearing procedure required of the Department of Revenue within 30 days of receipt of a demand therefor by "any taxpayer aggrieved by any act of the department in a matter involving his liability for taxes...." OCGA § 50-13-12. OCGA §50-13-12 (d) recognizes that judicial remedies may also be available to the aggrieved taxpayer, and requires the taxpayer to elect between pursuing judicial remedies or the remedy available for a "contested case" within the APA.

7. The above survey of certain provisions of Georgia law in place and available to appellant prior to its payment of taxes in 1982 - 1985 establishes that appellant had available to it several means by which it could attack the validity of former OCGA § 3-4-60 prior to remitting taxes due thereunder. Instead, appellant chose to pay the taxes charged without questioning the legal basis therefor. Having failed to avail itself of any one of the variety of predeprivation remedies available to it, appellant cannot now complain. See United States v. Tax Commission of Mississippi, 412 U.S. 363, 368, n. 11 (93 SC 2183, 37 LE2d 1) (1973); McKesson v.

Fla. Div. of Alcoholic &c., supra, at 2251, n. 21.

We conclude that appellant was procedurally barred from pursuing a refund action for the taxes remitted in 1982 - 1985 pursuant to former OCGA § 3-4-60 and that, even if appellant were entitled to pursue a refund action, its failure to avail itself of the predeprivation remedies available to it prior to payment of the disputed taxes results in denial of recovery of taxes so paid.

8. In light of our decision on the issues raised in A93A1217, we need not address the enumeration of errors asserted in A93A1218.

Judgment affirmed. All the Justices concur, except Sears-Collins and Carley, JJ., who concur in Divisions 1 and 2 and the judgment.

S93A1217, S93A1218. JAMES B. BEAM DISTILLING CO. v. THE STATE OF
GEORGIA et al. (two cases)

CARLEY, Justice, concurring.

Divisions 1 and 2 of the majority opinion hold that appellant has no standing to seek a refund of taxes that it previously paid the State pursuant to former OCGA § 3-4-60. I concur fully in those divisions and in the judgment of affirmance based upon the procedural bar of appellant's lack of standing. Since appellant has no standing to seek a refund, I would not reach the merits of appellant's entitlement to recover a refund which the majority addresses in Divisions 3, 4, 5, 6 and 7 of its opinion. I would note, however, that, for the reasons set forth in my dissent in Reich v. Collins, __ Ga. __ (Case Number S93A0621, decided December , 1993), I believe that the majority erroneously holds in those divisions that appellant would be barred from recovering a refund for its failure to have pursued the predeprivation remedies that are available to a Georgia taxpayer.

I am authorized to state that Justice Sears-Collins joins in this opinion.