ORAL ARGUMENT — 11/18/98
97-1044
FLEMING FOODS V. SHARP

MORRIS: Petitioners' refund claim on this sales tax case was denied solely on the basis that the limitations period had expired even though petitioner and the comptroller had entered into a series of written agreements on the promulgated form to extend the limitations period. The courts below held that petitioner, not being a direct pay taxpayer, one who pays directly to the state instead of through its vendors, could not file a refund claim under Tax Code §111.104 and, thus, could not extend the limitations period under the extension agreement in Tax Code §111.203. This is a tax case and there are all these code sections. For these two, which are the principal sections, in the future I will refer to them as .104, which is the refund section, and just .203, which is the extension section instead of repeating 111 each time.

The pre-tax code statute, old article 1.11a in its subsection (3), limited refunds to direct pay taxpayers. With the 1981 tax code, that changed. 104 has no such restrictions on who may apply for a refund. But the policy of the old law is still found in comptroller's rule 3.325b, which the CA upheld over the admittedly clear language of the statute under the doctrine of legislative acceptance even though it agreed that the language of the statute was clear and unambiguous.

OWEN: You aren't attacking directly the validity of the regulations. Why aren't you bound by them if you've not said they've got to be struck down?

MORRIS: We have attacked the validity of that regulation. We said the regulation is contrary to the statute and regulations are rule.

OWEN: You've said it's contrary. You've just said that the statute trumps. What am I missing here? You have not made a frontal attack on the ability of the comptroller to pass these regulations and say that they are void and without attack.

MORRIS: Well it's because there is a two-prong attack here. It's the doctrine of legislative acceptance of the rule, which contradicts the statute, and it is also the argument which the CA upheld that because the change from the pre-1981 law to the 1981 law was in a codification labeled a 'non-substantive codification', that that controls over the language of the Code as it is written. And so we are protesting it on both counts.

SPECTOR: Could you explain to the court the difference between the direct paid taxpayers and Fleming, and why that - are they both liable for unpaid taxes?

MORRIS: They both pay the same taxes on the same purchases at the same rates. There is no difference in classification of taxpayer. Nearly all taxpayers pay their sales taxes as a part of

a purchase price. They pay it to the seller, also called retailer, also called vendor. That is in tax code §151.052. It's a part of the purchase price. There is a specific set of provisions for what are called direct pay taxpayers in the current code. They are very explicit. What you do, you have to go through and get permitted to do this. It's restricted to very big taxpayers. You have to have annual taxable purchases of $800,000 or more. So very few people do this. And then when you buy something that is taxable instead of paying the sales tax, you give an exemption certificate to the seller, and they keep that. So then when they get audited they can explain why they didn't collect the tax. If you're a large taxpayer and you deal repeatedly with the same vendors, then instead of giving one each time you give what is called a 'blanket exemption.' It's like a contract that says, "we're going to be buying taxable items from you for this period, for this period. We are registered with the comptroller under these rules. We are going to permit the taxes directly to the comptroller, and therefore, you don't have to collect them from us and you can rely on this statement." Fleming has not elected to be a direct pay taxpayer. Fleming is a large wholesale food company that serves a lot of grocery stores, but it pays its sales taxes on its purchases as it makes them.

SPECTOR: And then the vendor remits that to the comptroller?

MORRIS: The vendor remits the tax to the state on a monthly basis. Yes. The applicable statute here is the extension of limitations statute, because this claim for refund was denied solely on the basis of limitations and on no other basis. At the end of this audit, Fleming paid some money on taxes it owed, and then it presented refund claims some of which were allowed, and then some of which were denied under the limitations rule. And we're protesting only the ones that were denied strictly for limitations. And the basis of our argument is, you had a form, you presented it to ...

BAKER: On the refund applications that were paid was limitations a problem on any of those that was paid?

MORRIS: No. Limitations was not a problem on the ones where they pay the state.

BAKER: So in the mix of what's happened here those payments are immaterial to the issue?

MORRIS: Those payments are immaterial except that it acknowledges that we were paid refunds on taxes paid through our vendors.

BAKER: But under the state's viewpoint, that may be immaterial because they perceive the difference between being able to be an assignee of the right to the refund and being an entity that can or cannot sign an extension agreement?

MORRIS: But you would have to have the rights of an assignee in order to sign - execute a waiver of limitations for the taxpayer. And it is our contention that we are not assignees of the

vendors, that code §111.104(f) among other code sections makes a very hard distinction between vendors and taxpayers.

Section 111.104(b), says: That the person who paid the taxes can apply for a refund of erroneously or unlawfully collected taxes. Section 111.104(c) says: It must be in writing and then provide some time limits. It provides some litter procedural rules.

And something that is new to the '81 code completely, it was passed as a last minute package for the old tax law but with a perspective date, and then it was repealed when they found out they passed it in the tax code, repealed the old laws, but along the way as happens in the legislative process, they had also put up a bunch of amendments to the old tax code with Jan. 1, 1982 dates, and suddenly they had amendments alive for a law they had repealed and replaced with a tax code. But the first time it's appeared in a working statute, an effective statute, is in 111.104(f). A vendor can only apply for a refund if it has already refunded in full to the taxpayers. So 111.104(f) does several things. One, it makes it very clear there's a distinction between the vendor and the taxpayer. That's not a distinction that was necessarily picked up on in the decision of the CA. Two, whether 111.104(f) is a separate refunding provision for vendors, or whether it is a modification of 111.104(b), the standard refund provision but for vendors. We know that vendors can't get refunds until they have already refunded to the taxpayer.

There are several logical consequences out of this. One, the taxpayer's rights can't be derivative of the vendors. If the vendor has already refunded to the taxpayer how could the taxpayer then apply to the state for a refund of the same taxes it's already recovered? It can't. Two, although 111.104(b) lets the taxpayer or its attorney, assignees, what have you file the claim, 111.104(f) does not have assignment provisions. Vendors don't have the right to assign their refund rights, such as they may be. And that's self evident. To whom would they assign it? Other than having their lawyer file for it they can't assign it to the taxpayer because they've already refunded to the taxpayer. Because of the language of 111.104(f) it's very clear that taxpayers and vendors are different entities and that they are treated differently, and it's very clear that taxpayers stand in their own shoes with regard to their rights and are not derivative of their vendors.

Along with this, the extension of limitations statute, .203, says very clearly: The comptroller and a taxpayer may enter into an agreement in writing to extend the statute of limitations for refunds for credits and for additional assessments for the same tax for the same periods. It doesn't say: The comptroller and a direct pay taxpayer can do it. It says: The comptroller and a taxpayer. It doesn't say: The comptroller and a vendor can do it. And vendors clearly are different from taxpayers.

ENOCH: In the facts in this case, the comptroller and the taxpayer entered into an extension agreement?

MORRIS: That's correct. An extension agreement is a one-pager. It's written by the

state. You can't alter it. And there's only signature space for the comptroller's representative and the taxpayer or its representative.

ENOCH: Now there's an argument that the comptroller has a rule that said that they should have only done that with a direct payer. Is that what the argument is?

MORRIS: That's correct.

ENOCH: It may be the comptroller violated its rule, but under the statute it did have the authority to do so?

MORRIS: Except that rules have to be consistent and the rule is applied on an ad hoc basis, because we got some of our refunds back.

ENOCH: But still the comptroller may not have followed its own rule, but it did do what was authorized under the statute, which was it did enter into an extension agreement on these other...

MORRIS: It entered into an extension agreement with us. And they are all in the statement of facts in the record. They kept coming back to extend and we always signed, and signed, and signed.

BAKER: I'm a little confused about your argument. A vendor in the circumstances we have here was the taxpayer from whom the amount was collected. Isn't that correct or is that not correct?

MORRIS: No, it's not correct because the vendor is not a taxpayer. The vendor is a remitter. Taxpayer is a defined term. Section 101.003(8) is the one liable for the tax. And 151.052 says: That the one who is liable for the tax, which means taxpayer, pays it as a part of the sale price. And 111.016 says: The person who collected it, which is the vendor, holds it as a trustee to remit it to the state.

BAKER: So your view is that the taxpayer named in most statutes that apply here can only be, and is Fleming?

MORRIS: In this case it would be Fleming. In similar case it would be the actual taxpayers.

BAKER: So we don't really have an assignee or other successor, we just have this one entity?

* * * * * * * * * *

RESPONDENT

LAWYER: This is a case to determine when and how sales tax refunds or credits may be claimed. And I have to begin, I think, by saying that Fleming has a basic misconception about who the taxpayer is. The vendor is just as much a taxpayer under the sales tax as the purchaser is, and perhaps even more so, because all sales tax system works through the vendors. These are the people who need to get sales tax permits, who have to add the tax to their contract price if it's a taxable item. They have to give that tax to the state. They have to keep the records that show whether a transaction was taxable, and they have to submit to audits by the comptroller periodically to see whether tax was properly charged and paid over to the state.

SPECTOR: How do you explain then the refund claims that were allowed?

LAWYER: Those are based on timely assignments, I believe. And I also should point out the record is really very sketchy. We do not have the audit in the record and so I can't promise you that that's the only basis, but Fleming did get assignments from some of its vendors. And under the policy it's the person who directly pays to the state who has the right for the refund or credit. It was necessary for Fleming as a purchaser to get those assignments in order to make their claim for the credit good.

ENOCH: So your position is, that I, as a consumer am not a taxpayer of sales tax?

LAWYER: No, that's not true. You would be a taxpayer.

ENOCH: And if I'm a taxpayer of a sales tax and I've been improperly charged for sales tax that's been remitted to the state, I don't have the right to a refund?

LAWYER: You don't have a right to claim the refund directly from the state. Because the problem basically is when you are a purchaser if you've been charged by your vendor a tax that didn't apply, you've got a problem with your contract price. You've been overcharged under your contract.

ENOCH: So, I as a taxpayer, I'm obligated to pay the tax. The state doesn't have the right to come to me as a consumer and get the sales tax that was not charged to me by the vendor?

LAWYER: In practice, we would not come to individual consumers. But where we have permanent(?) businesses who are selling items they will also be audited for their taxable purchases.

HANKINSON: You state the issue differently than Mr. Morris does. Mr. Morris says that the case is about who can agree to extend limitations, and who can enter an agreement to do that under §203. And you've just said it's who's entitled to a refund. Isn't this case really about interpreting the limitations provision?

LAWYER: That's probably the more significant question in some sense here.

HANKINSON: Aren't those the claims that Fleming was complaining about, those that were denied because the comptroller took the position that limitations had not been extended under the statute?

LAWYER: Fleming's limitations were certainly extended, and it had refunded credit rights that went along with that. The problem is not in whether there was a balance extension of limitations. The problem is in what were the substantive rights that were extended.

OWEN: You say that these extension agreements under .203(a) extended the state's right to come back and assess taxes on these very sales taxes we're talking about. But that it did not extend the time for refund, that it was a one-side extension, is that your position?

LAWYER: No, not exactly.

OWEN: Just with respect to these taxes is it one-sided or not?

LAWYER: But these taxes of course were already paid by the purchaser to the vendor.

OWEN: Were these subject to audit? Were you auditing these taxes?

LAWYER: Not the ones that were paid, because they were already paid. We were auditing similar transactions which would be purchases where the tax should have been paid, but was not paid.

OWEN: But these extension agreements still left open the possibility that you could have said: You paid these taxes, but they were not enough, you still owe more.

LAWYER: Yes.

OWEN: But by the same token it did not extend the time for the taxpayer to say: No, I over paid. I am entitled to a refund.

LAWYER: Because that was not a right that they had in the absence of the assignment.

OWEN: But my point is it was a one-sided extension agreement from that perspective?

LAWYER: Yes. There is a different result.

OWEN: So it's only an extension for the state, not for the taxpayer with respect to these taxes?

LAWYER: Let me try to illustrate it this way. Because it's only an extension of the rights

that the parties have. So let's say we have an injured person or we have a construction contract dispute. The parties are trying to resolve that problem, but time is running out. Now they haven't given up yet, but their limitations are about to run. And so they say: Look, maybe we can work this out, how about we agree to extend the time for filing suit on your claims for another 6 months? Well they sign the agreement but they don't reach an agreement of final settlement. Right, then the plaintiff's sue. Well plaintiffs starts to sue for some damages of some claims that are not recognized by tort of contract law. And they say: Well you agreed. I could file my suit for claims and damages. And the vendor says: Wait a minute, I only agreed to extend the time. I didn't agree to give you a substantive right that you didn't have.

OWEN: My point is, you by this agreement, the state, could have come back and said: The taxes that you've already paid were not enough, you're deficient. And that extension agreement applied to these sales taxes to allow you to come back and say they were deficient.

LAWYER: Different transactions.

OWEN: I'm talking about these transactions.

LAWYER: No, they are different transactions. We're not increasing the tax on the prior transaction.

OWEN: No, but you could have. The extension agreement would have given you the right to come in and say: These very taxes that are at issue are deficient.

LAWYER: I guess, but there wouldn't be a way to have them have a credit available and have a tax at the same time. You just have one transaction that's going to be taxable or not. And it's going to be taxable at a certain rate depending on where the sale is. So you couldn't simultaneously have a credit and additional tax on that transaction.

OWEN: My point is, with respect to these sales taxes, Fleming says: I overpaid. Conceivably, you could have come in and said: No, you underpaid. And even though you paid 3%, you should have paid 6%. So these sales taxes that you paid are deficient. And this extension agreement would have allowed you to come in and make that deficiency claim. But it would not allow Fleming to make the refund claim?

LAWYER: Yes, because this statute that allows him to claim the credit or refund requires that the person have directly paid that tax to the state. So if you are a purchaser who has paid a vendor, then you have paid directly to the state. And under the legislature's policy, not the comptrollers, that person is not able to get a refund or credit unless they have an assignment.

HECHT: Which they later got?

LAWYER: They got them, yes. And they got them well after the fact. Some are still good and some are not.

HECHT: What's the point of getting an extension agreement without the assignment?

LAWYER: That's an important point. For instance, as I say in audits ordinarily we are looking at vendors. These are the people who have the front line responsibility to send the tax to the state. And as you see in the refund statute, they don't get a refund economically because before they can get a refund of a tax that wasn't owed they've got to give their money to the customer from whom they collected it. So I think as a practical matter extensions are assigned not because of an economic interest per se, but because it's in everyone's interest to have an orderly and accurate audit. It's the administrative sense that it makes for the business as well as the comptroller to have the comptroller make the most accurate assessment they can. That's the real consideration for the agreement.

ENOCH: If as you say, the vendor is the only taxpayer for the purposes of refunding, and this taxpayer has no right of refund without refunding to this other person who would be the consumer, and the consumer can't get a refund from the state unless it gets this assignment, but the assignment by definition is extinguished, there could never be an assignment?

LAWYER: No, not at all. Because what happens is, who's going to keep the money. If the vendor is getting the refund money from the state, they will have a double recovery unless they give the tax back to the purchaser.

ENOCH: But the vendor has no claim against the state unless it has already refunded that money to the taxpayer. If it refunds the money to the taxpayer, then the vendor has a right to a refund to itself, but the taxpayer has no right to a refund. So the taxpayer gets this assignment of a right of refund that's already been paid. The defense would be: Mr. Taxpayer, you've been assigned this right, but you've already been paid. So it seems to be illogical here.

LAWYER: Once the vendor gives the tax back to the taxpayer, the taxpayer is made whole.

ENOCH: So there would be no assignment?

LAWYER: Well there is an assignment, because the vendor is typically the person who is directly paid to the state.

ENOCH: Then assignment runs from the taxpayer, the real taxpayer to the vendor?

LAWYER: No. The vendor is a person who directly paid. And under the substantive law, you have to have directly paid its tax to the state in order to claim a refund. So let's say the purchaser who is a person economically interested wants to get the refund, but the legislature has said: You

have to go to the person who has directly paid. They are the ones who get the assignment from the vendor. And then the purchaser can go forward with that assignment and get the money from the comptroller.

ENOCH: Only the vendor can get the refund from the state?

LAWYER: Unless it's a direct pay taxpayer.

ENOCH: Okay. Only the vendor can get the refund from the state, that's your position?

LAWYER: In this circumstances, yes. Only the vendor gets the refund from the state.

ENOCH: But the vendor can only get that refund if the vendor has paid the original taxpayer the money back?

LAWYER: Yes, but the vendor's assignee can get the refund, which is where Fleming would be in this case.

BAKER: But how can he be if he's the same one that's got the money back from the vendor in the first place?

LAWYER: The vendor is either going to give an assignment to Fleming, or it's going to give the money to Fleming. If the vendor gives the assignment to Fleming, Fleming comes to the comptroller and gets the money.

ENOCH: Okay, stop right there. The assignment, the right that's being assigned, is only valid if the vendor has paid the taxpayer?

LAWYER: No, the vendor's assignment to Fleming is a substitute for giving the money to Fleming.

ENOCH: Okay. The vendor has either the right to go for a refund directly, or it has under statute a right to assign?

LAWYER: Yes. And if they go for the refund directly, then of course, they have to give the money to the taxpayer, or else they get the double recovery.

ENOCH: So you disagree with Mr. Morris who said, the only thing that can be assigned is the right of refund, but the right of refund is contingent on the vendor reimbursing the taxpayer. Do you disagree with his statement?

LAWYER: I certainly disagree with his characterization of it because, otherwise, you

would have the purchaser getting the double refund. It doesn't work that way. What we have here is just a rule of privity, that if the state gets the money from someone, the state can give it directly back to that person. And if the state doesn't get it directly from that person, then the person has to go through the one that they were dealing with...

HANKINSON: Let me see if I understand something you answered earlier in response to one of Justice Owen's questions. Your view is that we can only interpret .203 by looking to what rights there are under .104?

LAWYER: Yes.

HANKINSON: We cannot interpret .203 separately using the definition of taxpayer that's elsewhere in the code?

LAWYER: I would not say that. I think any taxpayer can extend limitations.

HECHT: Only for himself?

LAWYER: Only for himself.

HECHT: But what's the point in this case? Why would Fleming do it only for himself if he can't get the money?

LAWYER: I think one answer again is just the administrative sense of having an accurate audit. And they can get the money if they do it timely.

BAKER: Do I understand that the audit that was accomplished in this case was an audit of Fleming and not the vendors?

LAWYER: Correct.

BAKER: And that the comptroller determined that Fleming had underpaid when it transmitted money to the vendors, so that this audit is unpaid taxes from Fleming and, therefore, why isn't Fleming the taxpayer, because you're trying to charge him for non payments? Or is it the next step: they're not worried about the claim that they've underpaid. They are saying we overpaid and we want our money back, and that's why we are in this controversy here today.

LAWYER: Fleming is a taxpayer, and the audit I think included both purchases and sales that they made that they should have collected tax on. Again, we are very hindered here because we don't have a good record, we don't have the audit in there. When Fleming goes through the audit, it's going to be liable for assessments if it hasn't underpaid the tax. It may be entitled to credits or refunds if there is some transaction where it overpaid. For instance, if it had paid use tax to the state,

which was a compliment to the sales tax, once they have paid it directly to the state they are absolutely entitled to take that credit or refund. And the extension doesn't address the rights that they have. If the legislature had said that the person entitled to a credit or refund is a person who has paid directly to the state.

HANKINSON: But .203 says, that the comptroller and a taxpayer may agree in writing to the filing of a refund claim?

LAWYER: That's correct.

HANKINSON: And basically if I'm the taxpayer and I'm not a direct taxpayer, I don't pay directly to the state, and I say under that agreement it doesn't mean anything, it doesn't extend anything, it's not worth anything?

LAWYER: That's not correct at all. We can extend the time, but I do not when I extend the time give you an expansion of your substantive rights. And that's what Fleming is saying. They are saying that they can read just the common language in the code ignoring the fact that it is a codification and it's supposed to continue the prior substantive law. And they are saying that what they really have is an expansion of their rights, not just an extension of time, that because of this agreement they can come in and claim directly from the state a refund that the substantive law and the comptroller's rule say they can't claim.

HECHT: No, they are saying that the extension agreement should apply to the right that they got by assignment later, which was the only reason for the extension agreement in the first place.

LAWYER: Right. And the problem there, of course, is the comptroller doesn't extend stuff that's expired.

HECHT: But it wasn't expired at the time?

LAWYER: But it was expired at the time, I believe. Some of them may have been, and indeed, there again that's part of our problem in seeing the record. When the assignments were presented to the comptroller they were expired.

HANKINSON: But limitations had not expired at the time that the agreement to extend was signed had it?

LAWYER: Right.

HANKINSON: Had the period for filing a refund claim expired at the time that the agreement was signed between Fleming and the comptroller?

LAWYER: No. But it wasn't an extension of rights that they didn't have. We only extended the rights that they did have.

HECHT: If they had the assignments at the time of the extension agreements they would be entitled to refund?

LAWYER: It would absolutely be a different case. And there is still I think the question under basic law of assignments whether it needs to be presented within limitations to the obligor under the assignment. And we haven't briefed that issue. Again, that's not the case here. By the time they got any of these assignments, the vendor's rights who were the persons who had paid directly to the state were long expired. And at the time the extension agreement was signed it could only extend the rights that Fleming had, not some that it didn't have. The comptroller couldn't really reasonably under any agreement and Fleming shouldn't interpret the agreement to read, that the comptroller is giving Fleming new substantive rights, which under the statutory law and which under the comptroller's rule, Fleming didn't have. It would, just as if you had your extension with an injured party, could come in and maybe sue for reputation damages on a personal injury case. When we agreed to extend the time for filing suit, we didn't agree that you had a broader scope of rights that were being extended.

OWEN: If we disagree with you about your construction of the statute, and we conclude that when the legislature changed the law they did substantively change it, and now there is no longer the direct taxpayer requirement, does that statute trump the comptroller's regulations or not?

LAWYER: No. Because you still have to look at the rule. And when you look at the statute, first of all it just says that the person who pays the tax can claim. And frankly, it is ambiguous because it doesn't say to whom.

OWEN: But let's say we held against you on it. You lose. We say that under the statute, Fleming is entitled to get a refund. How does that impact the regulations, because the regulations there are clearly contrary to the statute? Do the regulations govern or does the statute govern?

LAWYER: If you conclude that the rule is clearly contrary, I think that would be wrong. But if that's the conclusion that the rule is no good, then the rule would be no good.

OWEN: Are you construing the case before us to challenge the validity of the regulations themselves?

LAWYER: No, it really hasn't been put in those terms.

OWEN: My question to you is, can we reach that issue? In other words, on the record

before us if we hold against you on the statute should we, therefore, say that the statute does trump the regulations in this case or not?

LAWYER: I believe if the court is going to read the extension agreement to allow Fleming to make a refund claim, which in fact the rule doesn't allow, then there is only one way to go. You are either allowing the claim or you are not.

OWEN: If the rule is contrary to the statute, which governs this claim, the statute or the comptroller's rules?

LAWYER: Well the statutes always _____ to a rule. The rule can only be not inconsistent with the statute. And again, I point out that it's the legislative policy that the comptroller is trying to uphold here. Because the whole point of a codification is that it carries forward the prior substantive law. And so if we are going to say that any old code can provide different law just because the words are different, it's going to be an awful lot of trouble.

OWEN: What's the point of codifying if you have to go back to the old statute to make sure that it means what you think it means?

LAWYER: I freely confess that it's awfully annoying when the code doesn't plainly carry forward the meaning that the prior law had. And I think that's one of the clear rationales the comptroller had for putting it immediately into his rule that, "yes, the same substantive law applies; yes, the purchaser doesn't claim the refund directly, you have to go through the person who paid the tax directly to the state." If we're going to say that any code is subject to reinterpretation despite the absolutely clear legislative intent that it not be, we're going to open up a big can of worms.

* * * * * * * * * *

REBUTTAL

MORRIS: First, a part of the apparent confusion obvious in the dialogue today was pervasive in the CA's decision. The CA did not distinguish between taxpayers and vendors. The CA treated direct pay, taxpayers, which under the present code is just the people who would pay directly under those complicated statutes and be licensed to do that with vendors.

OWEN: But you concede the old law did just that?

MORRIS: The old law, but not the new law.

OWEN: Then how do you respond to the preamble that says: This is simply carrying forward?

MORRIS: This court has a number of cases in the past several years, because the

legislature has a tendency to say this is a non-substantive recodification. If it says it's nonsubstantive, and in fact there are no significant or meaningful changes, then the rules and rationales for the old law carry over _____ the new law. But where there are significant changes, you have to go back to the primary rule of construction. We're looking for the intention of the legislature, and the intention of the legislature is best found and is found first in the language of the statute. There are significant changes here.

The language in *Coastal Industries Water Authority v. Trinity Portland Cement* says, that the nonsubstantive change is honored only where in fact there are no significant changes. In *City of LaPorte v. Barfield* they considered the nonsubstantive codification of the labor code on waivers of municipality immunity. But this court resorted to considerations of legislative history only after considering the wording of the statute, including the new labor code and finding that the statutory language itself did not leave the court with an answer to a degree of reasonable certainty. In *Texas Mexican Railway v. Buchey(?)*, the court found that the old statute had been codified into the Labor Code without meaningful or significant changes in wording.

I think in the language in *Coastal Industries Water Authority* where the court said: That if there are no significant changes on a nonsubstantive recodification, the old interpretations carry forward, that's a but if.

OWEN: Where the preamble to the code says, no substantive changes, but there are, and we have said, well the plain meaning overrides the legislature's intent that there not be substantive changes, have we actually held that?

MORRIS: You did very recently in *Jones v. Fowler*. There the family code was amended by two bills: one said, this is a nonsubstantive change: H.B. 65; H.B. 433 said, but we're going to put these enumerated substantive changes into the nonsubstantive changes of the other house bill. And the statute that came before this court was in custody of a child was in the meaning on whether 'prior' meant 'immediately prior.' Because the word 'immediately' had been omitted, and the court said: "Well there are substantive changes. This is not one of them." And then, the court did what I would ask them to do in this case, and that is, it then considered the statutory meaning and the context of the whole code and uses of it elsewhere and sought to find complimentary uses and uniformity throughout the code.

If it had been designated a substantive change it would have been honored. In the language in *Coastal Industries*, it says: if there has been no significant change, which means if there is a significant change, I think we would have to look at it. Because that's where your legislative intention is found.

The statutes of limitations have to have a policy of even-handiness. And this is particularly so in tax cases, because the audits are for a particular tax recording period. And when it's over, it's over. And if somebody underpaid or overpaid it's too late. And I don't see how the state

can interpret its own extension statute and its own extension agreement, which it promulgates, and this taxpayer signed, which the vendor does not sign, can't sign, there's no provision for the vendor to sign, to say: this keeps the door open for additional assessments, but not for refunds and credits.