

Law  
Period.

# Tax Newsletter

January - March 1977



TAXATION SECTION

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Taxation Section  
State Bar of Michigan  
306 Townsend Street, Lansing, Mich. 48904

1976-77 OFFICERS AND COUNCIL MEMBERS

Robert B. Pierce, Chairman	Detroit
Ernest Getz, Vice-Chairman	Detroit
John N. Seaman, Secretary-Treasurer	Lansing
King S. Kearns	Dearborn
John L. King	Detroit
John P. Herrinton	Detroit
John W. McNeil	Grand Rapids
Lawrence J. Murphy	Southfield
Joel Resnick	Detroit
John E. Riecker	Midland
Richard R. Roesch	Lansing
George L. Whitfield	Grand Rapids
Louis W. Kasischke, Ex-Officio	Detroit

MINUTES OF REGULAR MEETING OF COUNCIL OF  
TAXATION SECTION OF STATE BAR OF MICHIGAN

Pursuant to Chairman Robert B. Pierce's notice dated January 9, 1977, a meeting of the council was held at the Dearborn Hyatt Regency Hotel on January 27, 1977, beginning at 10:00 a.m.

Present: Ernest Getz  
John P. Herrinton  
Louis W. Kasischke  
John L. King  
Lawrence J. Murphy  
Robert B. Pierce  
Joel Resnick  
Richard R. Roesch  
John N. Seaman

Also in attendance pursuant to invitation of the Chairman were representatives of the Michigan Association of Certified Public Accountants: Leonard G. Velick and Ronald Tank, and a member of the Taxation Section, Mr. H. Edward Lewis.

COUNCIL MEETING SCHEDULE. The next regular meeting of the council will be a dinner meeting on April 28, 1977 at the University Club in East Lansing at 4:00 p.m.

DISTRIBUTION OF MINUTES. The Chairman requested that copies of the minutes be sent to Ruth A. Rowse, ICLE, 432 Hutchins Hall, University of Michigan, Ann Arbor, MI and to the Chairman of the Tax Newsletter Committee, Mr. J. Lee Murphy at Miller, Johnson, Snell & Cumiskey, 465 Old Kent Building, Grand Rapids, MI 49502.

TAX NEWSLETTER. The Chairman stated that material, as always, is needed for the Newsletter. Mr. Roesch agreed to consult with Lee Murphy on items of Michigan tax interest.

LIASON WITH IRS. Lee Murphy is willing to continue as Chairman, and wants more activity from the Michigan Section. Bob Pierce will assist him if he needs help.

EMPLOYEE BENEFIT COMMITTEE. George Whitfield has not received much response. He requests that the Newsletter announce that the organization meeting will be held on February 10, 1977, and anyone interested should write or phone George Whitfield at Warner, Norcross and Judd, 900 Old Kent Building, Grand Rapids, MI 49502, telephone (616)-459-6121. (This announcement was also made at the Taxation Institute on January 28th).

TREASURER'S REPORT. The treasurer presented the report received from the State Bar office covering the period October 1 to December 31, 1976. The council requested that the treasurer obtain from the State Bar office, an itemization of the income and expense for that period. The council discussed financial commitments of the section, which include a contribution to the Single Business Tax publication being prepared by Wayne State University, and the renewal of the items furnished to the State Law Library. The Single Business Tax expense is estimated at \$300 to \$400. It was agreed that the Newsletter should contain a list of the tax management portfolios available at the State Law Library.

MICHIGAN STATE BAR 1977 ANNUAL MEETING. Jack King announced that the Tax Section meeting and seminar will be held on Wednesday ( as they were last year), at the Renaissance Center. Discussion of content for the seminar followed. It was the consensus that it should be aimed at the general practitioner. Possible subjects: summary of decisions and rulings; alimony; buy-sell agreements; legal fees.

REQUEST FOR A LIST OF SECTION MEMBERS. The Chairman reported that he had received a request from First of Michigan Corporation for our list of members, and they had stated that the MACPA had granted their similar request. Mr. Velick agreed to check into that statement.

SINGLE BUSINESS TAX COMMITTEE. Larry Murphy reported the enactment of technical amendments and that the task force is considering substantive changes. After further report from Mr. Kasischke, there was extended discussion of possible changes, and agreement that other service providers should have input.

TAX NEWSLETTER. Mr. Kasischke recommended that some legislative tax staff members and interested students should be placed on the mailing list for the Newsletter. Motion adopted, that these persons be placed on the mailing list, together with Mr. Velick and Mr. Tank of MACPA. Mr. Kasischke will give the names and addresses to Mrs. Rowse and Mr. Murphy.

JOINT SEMINAR WITH MACPA. The seminar will be held June 8, 1977 on tax considerations involving closely held businesses, and will be at the Dearborn Hyatt Regency Hotel. The topics will be choice of organization, continuing problems of corporations, taxable disposition of businesses, and planning for payment of estate tax. Attorney-speakers are needed for the first and fourth items and suggestions should be sent to Joel Resnick.

AMENDMENT OF BY-LAWS. The secretary was instructed to send the By-Law Amendment adopted September 15, 1976 to the Bar commissioners with request for approval and publication in the State Bar Journal.

The meeting was adjourned at noon.

FREMONT MUTUAL INSURANCE COMPANY,  
a Michigan Corporation,  
Plaintiff-Appellee,

-v-

No. 26306

STATE OF MICHIGAN, REVENUE DIVISION  
OF THE DEPARTMENT OF TREASURY,  
Defendant-Appellant.

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APPEAL FROM : Ingham County Circuit Court Judge  
James Kallman

BEFORE: Holbrook, PJ; and Allen and D.C. Riley, JJ.

OPINION WRITTEN BY: Allen, J.

FACTS: Plaintiff is a mutual insurance company. In 1965, it collected premium revenues and placed them in a special protection against loss account authorized by the federal Internal Revenue Code which allowed a deferral of taxation on those revenues for five years, i.e., until 1970. Michigan's corporate income tax became effective on January 1, 1968. In 1970, the remaining 1965 premium revenues were reported as taxable income on the plaintiff's federal tax return. The State of Michigan contended that it should also be allowed to tax the revenues in 1970. The plaintiff collected in a year when the State did not yet have an income tax. The circuit court agreed with plaintiff and ordered a refund. Defendant State of Michigan appeals.

ISSUE: (1) May the State tax revenue collected in a year before the state income tax was in effect?

HOLDING: (1) No. Michigan's income tax laws are designed to "piggy back" the federal tax laws so that taxable income and deductions will usually be the same for both federal and state returns. Still, that general principle must yield to another which prohibits retroactive application of tax laws.

AFFIRMED.

DUKESHERER FARMS, INC., a Michigan corporation,  
for itself and on behalf of all Cherry Producers in  
the State of Michigan,

Plaintiff-Appellant,

v

No. 26699

B. DALE BALL, Director of the Department of  
Agriculture, et al.

Defendants-Appellees,

and

MICHIGAN ASSOCIATION OF CHERRY PRODUCERS,

Intervening Defendant-

Appellee.

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APPEAL FROM: Berrien County Circuit Court  
Judge William S. White

BEFORE: R. B. Burns, P.J., and M.J. Kelly and  
S. S. Hughes, JJ.

OPINION WRITTEN BY: Judge Michael Kelly

FACTS:

This action originally began in 1972 when plaintiff filed a class action seeking a permanent injunction against actions by the defendants in carrying out the Michigan Cherry Promotion and Development Program ("Program") instituted pursuant to the Agricultural Commodities Marketing Act ("Act") MCLA 290.651, et seq.; MSA 12.94(21), et seq. The complaint further sought a declaration that the Act and Program are unconstitutional. After the Michigan Association of Cherry Producers was permitted to intervene as a defendant, the circuit court granted defendants' and intervening defendant's motion for accelerated judgment on the ground that plaintiff's petition was untimely filed. This Court affirmed in Dukesherer Farms, Inc. v Director of the Department of Agriculture, 52 Mich App 489; 220 NW2d 46 (1974). The Supreme Court reversed and remanded the case to the circuit court for consideration of the constitutional challenges. 393 Mich 758; 223 NW2d 294 (1974).

In the circuit court plaintiff moved for summary judgment on the ground that the Act is unconstitutional on its face because it improperly delegates general legislative and taxine powers, and fails to state distinctly the tax it assessed, all in violation of the Michigan Constitution. The circuit court denied plaintiff's motion and granted summary judgment for defendants, holding the Act constitutional. Plaintiff appeals on behalf of itself and all other cherry producers in the State of Michigan.

ISSUES:

(1) Do the assessments authorized by §5 of the Act constitute "taxes" and therefore become subject to constitutional limitations?

(2) Does the Act unlawfully delegate legislative powers to private individuals in violation of the Michigan Constitution?

HOLDINGS:

No.

(1) The Act was designed to regulate the establishment of marketing programs; its purpose is to finance the operation of such programs, not to generate revenue. As the circuit court found, the funds collected pursuant to the Act appear to be generated for the specific and narrowly defined purposes outlined in §3 of the Act. A distinct benefit is conferred on cherry producers; namely, assistance in marketing and processing to produce a greater demand for cherries. Therefore, the funds collected in support of the cherry program are "assessments" and not "taxes." Further, even if this were a tax, we hold that the Act does not improperly delegate legislative taxing authority. The Act is constitutional.

(2) There is no improper unconstitutional delegation of legislative authority in the Act. A delegation involving participation by industry members is not unconstitutional when an administrator has the power to approve the program as is provided in Section 10(a) of the Act.

B.P.A. II, et al,

Plaintiffs-Appellants  
Cross-Appellees,

v

Docket #25212

HARRISON TOWNSHIP,

Defendant-Appellee  
Cross-Appellant.

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APPEAL FROM: Macomb County Circuit Judge  
GEORGE R. DENEWETH

BEFORE: Maher, P.J., and V. J. Brennan and N. J.  
Kaufman, JJ.

OPINION WRITTEN BY: V. J. BRENNAN, J.

FACTS: On January 1, 1972, plaintiffs BPA II and Brittany Park Apartments, its predecessor Building Project [hereafter BPA I] sued to obtain Mandamus against defendant Harrison Township in Macomb County Circuit Court. Plaintiff prayed defendant be compelled to issue occupancy permits alleged wrongfully withheld by defendant's township board incident to a dispute over payment of township ordinance cost increases voted for water and sewer tap charges affecting plaintiff's BPA II building venture. By stipulation dated August 9, 1973, occupancy permits were ordered issued upon condition plaintiff file proper security bond in the matter. On January 1, 1974, trial was held on plaintiff's claim that the cost increase assessed against them was invalid. Judgment was entered against plaintiffs BPA II and Brittany Park Apartments for \$36,850. This appeal is of right.

ISSUE: Whether the trial court was clearly erroneous in finding BPA II consented to application of its check for \$91,925, dated October 12, 1971, to an outstanding obligation of BPA I?

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EAGLE CREST APARTMENTS NORTH,  
Plaintiff-Appellant,

-v-

No. 26529

DELHI CHARTER TOWNSHIP,  
Defendant-Appellee.

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BEFORE: S.J. Bronson, P.J.; Beasley and D. Anderson,  
Jr., JJ.

PER CURIAM

This is an appeal as of right from an order of the Michigan Tax Tribunal which had the effect of precluding the appellant from contesting either its 1973 or 1974 property tax assessments.

Section 35(1) of the Tax Tribunal Act provides as follows:

"A proceeding before the tribunal shall be original and independent and shall be considered de novo. In the case of an assessment appeal, the valuation of the same property must be protested before the Board of Review."

The Tax Tribunal concluded that the above statute applies to both appeals from assessments and to suits for refund of tax. This view finds support in Hutson v Royal Oak, 28 Mich App 393 (1970). In Hutson, this court held that where a tax payer paid his personal property taxes accompanied by written protest and then commenced a suit for repayment of taxes, his claim must, nevertheless, fail unless he had exhausted his administrative remedies. In that case, summary judgment was awarded defendant city because the tax payer had failed to apply to the Board of Review for relief.

The conclusion of the Tax Tribunal that administrative remedies must be exhausted before its jurisdiction may be invoked regardless of whether the action is an assessment appeal or a refund suit, is correct.

Appellant claims to have protested to the Township Board of Review in 1972 to protest the 1972 tax and in 1973 to protest both the 1972 and 1973 taxes.

However, appellant concedes failure to protest the 1974 taxes to the Township Board of Review. The Tax Tribunal Act became effective July 1, 1974, and, having paid the 1974 taxes, appellant sought redetermination and refund within thirty days under MCLA 205.731(b); MSA 7.650 (31) (b). Under Hutson, appellant's claim for refund of the 1974 taxes must fail for failure to protest to the Board of Review. Nothing in this record excuses that failure of appellant.

With respect to the 1973 taxes, appellant asserts that he did protest to the Board of Review and he also points out that his 1972 action for redetermination and refund was pending. There is no prejudice to the taxing authority in requiring review of the 1973 taxes. The taxing authority had notice of the nature of appellant's claim by virtue of his 1972 action. Nor-Cote, Inc. v Wayne County, 47 Mich App 563 (1973) supports appellant's claim in this regard. Insofar as the Tax Tribunal order precludes consideration of appellant's claim for redetermination and refund of 1973 taxes, it is reversed. Appellant is entitled to consideration of his claim regarding the 1973 taxes, and his complaint may be amended accordingly.

Consistent with this opinion, the order of the Tax Tribunal is affirmed in part, reversed in part and remanded for further proceedings.

HOLDING: What the trial court found, and what defendant argues, is that plaintiffs are estopped by their silence from asserting that BPA II did not want its check applied to the debt still owing from BPA I.

The doctrine of estoppel by acquiescence presupposes that the party against whom the doctrine is asserted was guilty of inaction. Sufficient physical evidence existed to support the conclusion that a person of reasonable intelligence would have acted when he received the township's letter of October 2, 1971, stating BPA II funds would be applied to the BPA I obligation. Green v Millman Brothers, Inc, 7 Mich App 450, 457-485; 151 NW2d 860 (1967). Further, plaintiff's letter of November 2, 1971, clearly indicates that BPA II was in no disagreement with the letter of October 2, 1971, given their request there for "immediate deposit of our check".

We test such cases by whether the trial court was clearly erroneous. GCR 1963, 517.1. A "finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Tuttle v Highway Dept., 397 Mich 44, 46; 343 NW2d 244 (1976), citing United States v United State Gypsum Co, 333 US 364, 395; 68 S Ct 525, 542, 92 L Ed 746, 766 (1948). On the full record, we have no such firm and definite conviction of error, and so decline to reverse on this basis.

ISSUE: Whether BPA II had a vested right to sewer taps at the presurcharge price?

HOLDING: Resolution of this question depends primarily upon the Harrison Township ordinance. According to its provisions, "service charges and rates to users and beneficiaries of the combined system shall be proscribed from time to time" by the township board, making the surcharge of \$275 for sewer taps voted on December 13, 1971 appear entirely regular. However, BPA II argues the additional connection cost to phase two sewer taps was an impermissible retroactive charge as applied to them where they reasonably relied on the lower presurcharge fees.

The ordinance sets the point at which fees become due and owing as "\* \* \* the time of obtaining permit for such connection". To be entirely fair, we believe this lawsuit must be determined in accordance with the following question: Simply put, when did plaintiffs actually obtain permit for connection of sewage facilities? We feel that permit was obtained by the letter of October 8, 1971, some 13 days before the moratorium on sewer installation was declared. We hold that the fees were established at this point and that to allow defendant to charge plaintiffs the higher fees occasioned by the resolution of December 13, 1971, would be an impermissible retroactive charge.

Because of our resolution of this question, we find discussion of defendant's cross-appeal unnecessary.

Reversed.

## EDITOR'S NOTE

The following (p. 14) is the Tax Management portfolio listing for Foreign Income. The last issue (Oct.-Dec. 1976) included the portfolio lists for U.S. Income and Estates, Gifts and Trusts (pgs. 14-16). The Taxation section has made these three services available to the State Law Library in Lansing for use by members of the Bar. You also may borrow individual portfolios by mail by calling the State Law Library.

## TAX MANAGEMENT—FOREIGN INCOME

### Current Portfolio Classification Guide

#### DIRECT INVESTMENT

Export Financing: AID; CCC; EXIMBANK (64-4th)  
Foreign Investment in LDCs--OPIC, EXIMBANK, IFC,  
IDB, Et al. (168-3rd)

#### FOREIGN FINANCING

Currency Revaluation and Devaluation--Tax Effects (280)  
International Aspects of the U.S. Social Security Tax (332)  
International Finance Subsidiaries (215-2nd)  
Licensing and Technical Assistance Abroad (44-4th)

#### NONRESIDENTS' INCOME

Nonresident Individuals--U.S. Income Taxation and  
Withholding (Parts I and II) (138-3rd)

#### ALLOCATIONS UNDER SECTION 482

Foreign Income--Section 482 Allocations (115-2nd)

#### REORGANIZATIONS AND LIQUIDATIONS

Foreign Corporations--Reorganizations, Liquidations,  
and Similar Transactions Under Sections 367 and  
1491 (57-4th)

#### SUBPART F

Controlled Foreign Corporations--\$953 (235)  
Controlled Foreign Corporations--\$955 (109-2nd)  
Controlled Foreign Corporations--\$956 (232)  
Controlled Foreign Corporations--\$958 (259)  
Controlled Foreign Corporations--\$962 (294)  
Controlled Foreign Corporations--\$963 (105-3rd)  
Controlled Foreign Corporations--\$1248 (240-2nd)  
Foreign Operations--Base Companies (23-4th)

#### TAXATION OF FOREIGN ENTITIES

Foreign Corporations--U.S. Income Taxation (156-3rd)  
Foreign Partners, Partnerships, Trusts, Estates,  
and Beneficiaires (197-3rd)

#### TAXATION OF FOREIGN OPERATIONS

Citizens and Resident Aliens Employed Abroad (13-3rd)  
Domestic International Sales Corporations  
(DISC) (264-2nd)  
Foreign Operations--Source of Income (80-3rd)  
Foreign Personal Holding Companies (103)  
Foreign Tax Credit (5-3rd)  
U.S. Tax Treatment of Foreign Losses (306)  
Western Hemisphere Trade Corporations (30-2nd)

#### TREATIES

U.S. Tax Treaties With European Community Member  
Countries: Corporate Aspects (41-3rd)

#### BUSINESS OPERATIONS ABROAD (COUNTRIES)

Argentina (253-2nd)  
Australia (127-3rd)  
Austria (222-3rd)  
Belgium (93-4th)  
Canada (45-5th)  
Colombia (260-2nd)  
Dominican Republic (307)  
France (39-5th)  
Greece (194-2nd)  
India (86-4th)  
Israel (250-2nd)  
Italy (84-3rd)  
Luxembourg (164-2nd)  
# Netherlands (150-3rd)  
Netherlands Antilles (263)  
New Zealand (173)  
Peru (329)  
Puerto Rico (139-2nd)  
Republic of Ireland (125-2nd)  
Spain (273)  
# Switzerland (82-4th)  
Taiwan (328)  
United Kingdom (68-6th)  
United States (291)  
U.S. Virgin Islands (336)  
West Germany (174-3rd)

\* Indicates new Portfolio.  
# Indicates revised Portfolio.