State and Local Taxation Committee and Practice and Procedure Committee - State Tax Controversies: A View from Many Angles

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I. Audits, Assessments, Refund Denials

A. Inadequate Information and Audits

Inadequate Information. According to MCLA 205.21(1), if a taxpayer fails or refuses to make a return or payment as required, or the Department of Treasury ("Department") has reason to believe that a return made or payment does not supply sufficient information for an accurate determination of tax due, the Department may obtain information on which to base the assessment of tax.

The Department may choose from several options if it believes that inadequate information, or an inaccurate assessment of tax, exists. It may:

1. Conduct an audit. MCLA 205.21(1).
2. Send a letter of inquiry. MCLA 205.21(2)(a).
3. Issue a Notice of Intent to Assess. MCLA 205.21(2)(b).

Department of Treasury Audits.

The Department may conduct an audit of a taxpayer pursuant to MCLA 205.21(1). Pursuant to RAB 2008-8, the Department will send an "Audit Confirmation Letter" to begin the audit process (and toll the statute of limitations) and request certain documents and information. The audit may include meetings, exchange of documents and correspondence and will eventually conclude with issuance of a "Notice of Preliminary Audit Determination" and, 60 days later, a "Final Audit Determination Letter." The "Final Audit Determination Letter" will state that a taxpayer that disagrees with the Department's Audit Determination must wait until receipt of a Notice of Intent to Assess to begin an appeal.

Practitioner Tip: Taxpayers and their representatives may request audit worksheets, auditor's notes and other documentation of Treasury's audit work product during audits. If the audit involved review of a sample of transactions and subsequent imposition of liability on larger tax periods based on sample review (e.g., for sales or use liability), review of the Department's policy and procedure for sample methodology may be useful for taxpayer strategy. Also, per RAB 2008-8, the customary 4 year statute of limitations for assessment is suspended for the following: the period pending a final determination of tax, including audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department and for 1 year after that period.

Letters of Inquiry. The Department may inquire regarding the contents of a tax return or other filing (or failure to file) by Letter. A taxpayer may designate an attorney or CPA to act as "Taxpayer Representative" by filing Form 151, the State of Michigan Power of Attorney. Form 151 is the State's version of IRS Form 2848, Power of Attorney, and each of these forms must be filed for their respective levels of taxation and taxing authorities (i.e., the IRS form will not satisfy the Department's requirements and allow them to speak directly to a taxpayer's attorney).

Notices of Intent to Assess. The Department may send a Notice of Intent to Assess if a dispute is not resolved within 30 days after the Department sends a Letter of Inquiry, or if a Letter is not required. In case of such failure to resolve the dispute, the Department shall give notice to the taxpayer of its intent to assess the tax in a written notice including the amount of the tax the Department believes the taxpayer owes, the reason for that deficiency, and a statement advising the taxpayer of its right to an informal conference (if requested in writing within 60 days). MCLA 205.21(2)(b).

B. Assessments

Under MCLA 205.23(1), the Department may determine a taxpayer's tax liability and notify the taxpayer of that determination if the Department believes, based on examination of a tax return, a payment, or an audit, that the taxpayer has not satisfied a tax liability or made an excessive claim. A Notice of Intent to Assess may be appealed by requesting an Informal Conference in writing, within 60 days, to the Department.

Practitioner's Tip: The Department may not alter the basis for an assessment after the final assessment, *Pars Ice Cream Co. v Dept of Treasury*, MTT Dk No. 332949 (June 28, 2011), but it may issue a second final assessment after the taxpayer paid a first final assessment, if the statute of limitations remains open, *Tyson Foods, Inc. v Michigan Dept of Treasury*, 276 Mich App 678 (2007).

C. Refund Denials

Refund denials can occur when a taxpayer files a return (new or amended) with the Department, seeking a refund due to application of a refundable tax credit or other circumstance. The Department may choose to oppose certain claims for refund, based on legal arguments or facts and circumstances, and has engaged in litigation in past cases to defend its position.

Under MCLA 205.21a, an Informal Conference hearing is available as a first appeal step for denials of refunds or audits of claimed credits against tax liability. The taxpayer must, as in other cases where an Informal Conference is permitted, request the Conference in writing, within 60 days of issuance of the Department's denial of refund or credit audit.

D. Informal Conference Hearings

For a taxpayer aggrieved by an audit, adjusted tax return, assessment of tax or denial of a claim of refund, the first administrative step towards possible relief is the Informal Conference hearing. MCLA 205.21(2)(c) and (3) provides for Informal Conference hearings as a first administrative appeal in cases of receipt of a Notice of Intent to Assess, denial of a refund or audit of a claimed credit against tax. Such hearings are also permitted for a variety of statutorily specified matters such as cigarette seizures and principal residence exemption denials.

A taxpayer with a statutory right to an Informal Conference hearing must request such a hearing in writing, addressed to the Hearings Division of the Department, within 60 days of receipt of the notice (PRE exemption rescission, Notice of Intent to Assess, etc.) that may be appealed. Any uncontested amount of tax should be paid by the taxpayer before or on the date of the request, and the taxpayer should provide a statement explaining the dispute and its position. MCLA 205. 21(2)(c).

Informal Conference Process. Once an Informal Conference is requested, the taxpayer file is sent back to the taxing unit for review and, if the matter is not resolved prior to hearing (for example, by clarification of facts and circumstances), the Hearings Division will receive the file back and schedule a hearing in 18 to 24 months. The assigned Hearing Referee will review all submissions by both the taxpayer and Treasury prior to the Hearing, and after the Hearing before issuing his or her Decision and Order of Determination. The Decision and Order of Determination shall assess tax, interest and penalty found to be due and payable only due to the subject of the informal conference as included in the notice submitted by the taxpayer with its request for informal conference. MCLA 205.21(2)(e).

The Treasurer, or a designee, reviews the Hearing Referee's proposed Decision and may accept, accept in part or reject it. If the Referee's proposed Decision is rejected, the parties will receive a Reasons and Authority explaining the rejection. If the Treasurer's review upholds an Intent to Assess (or other decision such as loss of PRE exemption), the Decision will indicate that a Final Assessment will be issued and the Final Assessment, or a formal denial of a claim of refund, will indicate that it may be appealed to the Tax Tribunal or Court of Claims.

Practitioner Tip: At any level, Treasury may settle a tax liability or refund dispute, though it is not authorized by statute to compromise tax (MCLA 205.28(1)(e)). In other words, the parties may reach as settlement based on disputed audit methodology, or taxpayer identification of errors in Treasury's assessment of sales or use tax (for example), but Treasury may not "compromise" tax due to a taxpayer's inability to pay, or to further efficient tax administration, as the IRS may when taxpayers demonstrate inability to pay an assessment through the Offer in Compromise process.

The Informal Conference is optional, and taxpayers may disregard it and proceed directly to the Tax Tribunal or Court of Claims (or full payment and concession of the Department's position). However, Informal Conferences are free and may permit resolution of some disputes during the pre-hearing review stage. Accordingly, many taxpayers choose to request Informal Conferences in an attempt to either resolve their disputes, or to gain additional insight into the Department's position and evidence.

Practitioner Tip: The statement of dispute submitted with a request for an Informal Conference can be an opportunity for taxpayers (through their attorneys) to submit the tax forms and notices in question along with pertinent correspondence, documentary evidence and copies of cases or other authority that the taxpayer relied upon in forming its position. While the Informal Conference is "informal," the initial submission should be taken seriously as an opportunity to provide evidence and substantial persuasive arguments for the hearing officer's reference and review.

Finality of Final Assessments, Decisions and Orders. If any Final Assessment or Decision and Order of the Department is not timely appealed, in accordance with the appeal rights set forth on the Assessment or Decision, and the terms of the Revenue Act, that Assessment or Decision becomes final and is not reviewable in court by mandamus, appeal or other method of direct or collateral attack. MCL 205.22(4). Final Assessments are final, conclusive and not subject to further challenge after 90 days after the issuance of the Assessment, Decision or Order of the Department, and a person is not entitled to a refund of any tax, interest or penalty paid unless the aggrieved person appealed the Assessment pursuant to the Revenue Act. MCLA 205.22(5).

Exhibit A
Audits, Assessments, and Appeals

MICHIGAN STATE TAX PRACTICE AND PROCEDURE: AUDITS, ASSESSMENTS, AND APPEALS

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I. Introduction

The development of Michigan's state tax body of law resembles the construction of a building. The United States Constitution and Michigan's Constitution make up the foundation. The structure of Michigan state tax law is then "framed up" by state tax statutes within the Michigan Compiled Laws. The remaining parts that fill in and give flesh to the skeletal frame of the structure – the insulation, drywall, windows, doors, electrical, plumbing, siding, roof, fixtures, and flooring – are the varied and abundant legal tenants developed in state tax cases, born out of creative and new legal arguments.

Contrast Michigan's state tax law practice with Federal tax law practice which is primarily governed by the voluminous and unbending Internal Revenue Code (the "IRC"), the even more voluminous Treasury Regulations, and other published guidance issued by the Internal Revenue Service interpreting the IRC. While there are some rules promulgated to interpret Michigan state tax statutes and some published guidance issued by the Michigan Department of Treasury (the "Department"), in many cases judicial interpretation of a Michigan state tax statute turns on creative position advanced from either "side of the fence" regarding how the court should define key tax terms and interpret important statutory provisions. Weave into these arguments Commerce Clause and Due Process Constitutional considerations and a vibrant, ever-vacillating body of law is created.

While state tax cases often turn on a substantive issue of state tax law, state tax attorneys should give due diligence to procedural considerations. Regardless of the substantive issue involved, a case can be won or lost based on a "technicality" related to a procedural issue involved at any stage of a state tax matter, including audit, assessment, and litigation. During litigation, asserting that a simple procedural issue is the linchpin of a case can resonate with judges from the Michigan Court of Claims, Court of Appeals, and Supreme Court who may be less than eager to dive into a complicated and technical state tax issue. The non-tax-technical procedural issue may provide the Court a straightforward way to find in your client's favor.

The body of law that governs Michigan state tax practice and procedure consists of constitutional provisions, the Revenue Act (MCL 205.1 *et seq.*), case law, promulgated rules, Michigan Court Rules, and Michigan Tax Tribunal Rules. Additionally, the Department offers its interpretation of statutes and cases through issuing or publishing written guidance. The Department's written guidance – including Revenue Administrative Bulletins ("RAB"), Frequently Asked Questions ("FAQ"), instructions, and informational pamphlets – does not have the force of law but is merely explanatory as long as it is consistent with law. *Kmart Michigan Property Services, LLC v Dep't of Treasury*, 283 Mich App 647; 770 NW2d 915 (2009).

This article is intended to give new state tax attorneys a primer and seasoned state tax attorneys some refresher points on state tax practice and procedure. Studying and mastering Michigan state tax practice and procedure is important to developing new and creative arguments that could form or change a tenant of Michigan state tax law in your client's favor, much like a coat of yellow paint could dramatically change the façade of a white house.

II. Statute of Limitations

A. In General

The statute of limitations for both assessments and refund claims is four years. MCL 205.27a(2).

The Department may assess a deficiency, interest and/or penalty within four years of the date set for filing the required return or the date the return was filed, whichever is later. *Id*. If a taxpayer does not file a return, the statute of limitations never begins running. *Id*. If a person fraudulently conceals a liability or fails to inform the Department of an alteration or modification of federal tax liability, the Department may issue an assessment within two years of discovery of the fraud or failure to notify. *Id*. The interest and penalty will be calculated from when the original tax liability accrued. *Id*.

A taxpayer may file a refund claim within four years of the original due date of the return. MCL 205.27a(2). The submission of an amended tax return constitutes a claim for refund. MCL 205.30(2); *Clarke-Gravely Corp v Dep't of Treasury*, 412 Mich 484; 315 NW2d 517 (1982). The refund claim need not be made in a tax return but may be made by separate request. *NSK Corp v Dep't of Treasury*, 481 Mich 884; 748 NW2d 884 (2008). It is not clear in the Revenue Act whether there is a time limit for a taxpayer to request application of a tax credit.

The running of the statute of limitations will be suspended during audit, conference, hearing and litigation for federal tax or state tax matters and for one year thereafter, but only for items that were the subject of the audit, conference, hearing and litigation. MCL 205.27a(3) and (4). For purposes of determining the duration of time the statute of limitations is suspended for an audit, the audit begins on the "audit commencement date" specified in the "Audit Confirmation Letter" (for Audit Confirmation Letters issued on or after January 1, 2009) and is completed on the date of the "Final Audit Determination Letter." RAB 2008-8. The Department has also stated that Audit Confirmation Letters will define "the subject of the audit" for purposes of determining whether the statute of limitations is tolled. *Id*. See RAB 2008-8 for examples of factual scenarios demonstrating the running and tolling of the statute of limitations under MCL 205.27a.

B. Claims Based on Constitutional Grounds

A refund stemming from a claim that a tax law is invalid based on state or federal constitutional grounds or federal laws must be filed within 90 days of the date set for filing a return. MCL 205.27a(6). The 90-day statute of limitations in MCL 205.27a(6) does not violate the United States or Michigan Constitutions. *American States Ins Co v Dep't of Treasury*, 220 Mich App 86; 560 NW2d 644 (1996).

III. Records and Confidentiality

The Department or an agent of the Department may examine a taxpayer's books, records, and papers "touching the matter at issue of any person or taxpayer subject to any tax, unpaid account, or money the collection of which is charged to the department" or "if a taxpayer fails or refuses to make a return or payment as required, in whole or in part, or if the department has reason to believe that a return made or payment does not supply sufficient information for an accurate determination of the amount of tax due." MCL 205.3(a); MCL 205.21(1). The Department has the power to issue a subpoena to compel a taxpayer or its representative to appear and be examined and to produce books, records or papers. *Id*.; 1999 AC, R 205.4103. The Department may also compel a person to testify and to produce books, records and papers through the circuit court. *Id*. If a person fails to obey an order of the court, that person may be held in contempt. *Id*.

The Department's Recordkeeping and Retention Administrative Rules "set forth the requirements imposed on taxpayers for the maintenance and retention of books, records, and other sources of information." 1999 AC, R 205.4101-205.4114. The rules also address how a taxpayer is to maintain and produce records kept in an electronic format. *Id*.

A taxpayer may request copies of its Michigan tax returns and any documentation or information related to its returns by submitting a "Request for Michigan Tax Return Information" (Form 2078) to the Department's Disclosure Officer. If a taxpayer seeks to request other information from the Department, the taxpayer may submit a Freedom of Information Act ("FOIA") request under MCL 15.231 *et. seq.* However, if the taxpayer is engaged in civil litigation with the Department and is seeking information related to the litigation, the taxpayer's FOIA request would most likely be denied under MCL 15.243(1)(v). The taxpayer could instead request that information through the discovery stage of the litigation.

By filing an "Authorized Representative Declaration (Power of Attorney)" (Form 151) with the Department, an authorized representative may seek information related to the taxpayer's returns on the taxpayer's behalf. Under MCL 205.8, a taxpayer may also require the Department to send letters and notices issued by the Department to a designated representative:

> If a taxpayer files with the department a written request that copies of letters and notices regarding a dispute with that taxpayer be sent to the taxpayer's official representative, the department shall send the official representative, at the address designated by the taxpayer in the written request, a copy of each letter or notice sent to that taxpayer. A taxpayer shall not designate more than 1 official representative under this section for a single dispute.

See also *SMK, LLC v Dep't of Treasury*, 298 Mich App 302 (2012) (Department's Application for Leave to Appeal was granted by the Michigan Supreme Court on March 27, 2013). In November 2012, the Department modified its Power of Attorney form to state: "This form is not a written request requiring the Department to send copies of letters or notices regarding a dispute to your authorized representative (see MCL 205.8 of 1941 PA 122 and at R.205.1006(8) for further details." Accordingly, taxpayers are advised to submit a written request in addition to the

Power of Attorney form if the taxpayer would like the Department to send letters and notices regarding a tax dispute to a designated representative under MCL 205.8.

IV. Reliance on Bulletin or Letter Ruling

If a taxpayer relies on a revenue administrative bulletin ("RAB") or letter ruling issued to the taxpayer by the Department after September 30, 2006, the taxpayer "shall not be penalized for that reliance until the bulletin or letter ruling is revoked in writing." MCL 205.6a(1). However, a taxpayer's reliance should be "limited to issues addressed in the bulletin or letter ruling for tax periods up to the effective date of an amendment to the law upon which the bulletin or letter ruling is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin or letter ruling is based." *Id*. "Penalized" as the term is used in MCL 205.6a(1) is not defined in the Revenue Act leaving open the possibility of the Department and taxpayers disagreeing on whether the term includes interest and penalty.

V. Audit Procedures and Taxpayer Rights

If the Department determines a person has not submitted "sufficient information for an accurate determination of the amount of tax due," the Department may audit the accounts of a person and examine the person's books, records and papers. MCL 205.21(1).

When conducting an audit, Department employees and representatives must conduct themselves in a fair and courteous manner and must not engage in improper conduct. 1999 AC, R 205.1002.

A taxpayer may choose to represent itself or may be represented by any third party of the taxpayer's choosing in matters before the Department. 1999 AC, R 205.1005. If represented by a third party, a power of attorney form must be filed in order for the Department to disclose confidential information to the third party representative. 1999 AC, R 205.2006. A taxpayer may also designate an authorized representative to receive copies of letters and notices issued by the Department that are related to the dispute. MCL 205.8; *SMK, LLC v Dep't of Treasury*, 298 Mich App 302 (2012) (Department's Application for Leave to Appeal was granted by the Michigan Supreme Court on March 27, 2013). (See discussion above under "III. Records and Confidentiality.")

VI. Assessments

A. Letter of Inquiry

The Department must send a taxpayer a courteous and nonintimidating letter of inquiry if the Department believes that the taxpayer may owe additional tax or should furnish additional information to the state. MCL 205.21(2)(a). The Department must provide a reason for issuing a letter of inquiry. *Id*. The letter must also explain what a taxpayer must to do to resolve any dispute with the Department. *Id*. The Department does not need to send a letter of inquiry before issuing an intent to assess if (1) the taxpayer fails to pay a tax due as shown on a tax return, (2) the Department determined there was a deficiency by auditing the taxpayer's books and records, or (3) the taxpayer affirmatively admits a tax is due and owing. *Id*.

B. Notice of Intent to Assess

The Department must give a taxpayer notice in writing of its intent to assess, a Notice of Intent to Assess. MCL 205.21(2)(b). The Notice of Intent to Assess must be sent by either personal service or certified mail to the taxpayer's last known address. MCL 205.28(1)(a). If the Notice is sent to an old and inaccurate address when the Department has the taxpayer's current address on file from the filing of a tax return, the Notice does not comply with the requirement in MCL 205.28(1)(a) that the Notice be sent to the taxpayer's last known address. *Bickler v Dep't of Treasury*, 180 Mich App 205; 446 NW2d 644 (1989). However, "a defect in formal notice does not violate due process if notice was in fact given." *Auer v Dep't of Treasury*, 137 Mich App 353, 357; 357 NW2d 696 (1984).

The Department may issue a Notice of Intent to Assess within 30 days of sending a letter of inquiry, if the dispute is not resolved, if the Department is required to file a letter of inquiry under MCL 205.21(2)(a). *Id*. A Notice of Intent to Assess must include "the amount of tax the Department believes the taxpayer owes, the reason for that deficiency, and a statement advising the taxpayer of a right to an informal conference." *Id*. (See below "C. Right to an Informal Conference.")

If a taxpayer's appeal of a Notice of Intent to Assess is frivolous or pursued by the taxpayer with an objective to delay or impede the administration of tax, the Department may issue a penalty of the greater of 25% of the amount of tax protested or $25.00. MCL 205.21(3).

A taxpayer may appeal a Notice of Intent to Assess directly to the Tax Tribunal or Court of Claims in lieu of requesting an informal conference to challenge the Notice. *Montgomery Ward & Co v Dep't of Treasury*, 191 Mich App 674, 679; 478 NW2d 745 (1991).

C. Notice of Adjustment

If a taxpayer's return requests a refund of an overpayment, and the Department upon processing the return makes a determination that it will not refund all or a portion of that amount, the Department may issue a "Notice of Adjustment." Since this action does not require the taxpayer to *pay* an additional amount due, the Department may issue a document called a Notice of Adjustment instead of a Notice of Intent to Assess. Although the Revenue Act does not explicitly identify a document called a "Notice of Adjustment," a taxpayer may challenge a Notice of Adjustment by requesting an informal conference in the same manner a taxpayer would challenge a Notice of Intent to Assess under MCL 205.21. *Walter Toebe Construction Co v Dep't of Treasury*, 289 Mich App 659; 810 NW2d 128 (2010). Additionally, there is a basis for asserting that a Notice of Adjustment is an "assessment, decision, or order of the department" appealable to the Michigan Tax Tribunal within 35 days or to the Michigan Court of Claims within 90 days under MCL 205.22 *See Winget v Michigan Dep't of Treasury*, MTT No. 319852, 2007 WL 1175834 (2007).

D. Right to an Informal Conference

A taxpayer may request an informal conference to challenge a Notice of Intent to Assess. MCL 205.21(2)(b). A taxpayer may also request an informal conference to challenge a Notice of Adjustment. *Walter Toebe Construction Co v Dep't of Treasury*, 289 Mich App 659; 810 NW2d 128 (2010). The taxpayer must submit the request for informal conference in writing to the Department within 60 days of issuance of the Notice of Intent to Assess and must state the contested amounts and an explanation of the dispute. MCL 205.21(c). The taxpayer must also remit the uncontested amount of tax. *Id. See also* 1999 AC, R 205.1008.

The Hearings Division of the Department will schedule an informal conference for a mutually agreed upon or reasonable time and place. MCL 205.21(d); 1999 AC, R 205.1009. The Department must give the taxpayer notice of the informal conference not less than 20 days before the informal conference. *Id*. The Department must also give the taxpayer notice specifying the "intent to assess, type of tax, and tax year that is the subject of the informal conference." *Id*. The informal conference is not subject to Michigan's Administrative Procedures Act (MCL 24.201 *et. seq*.). *Id.*

"The purpose of the informal conference is to informally discuss the positions of the parties, more thoroughly narrow the issues that may not be capable of resolution at this level, and present arguments to the referee in support of the parties' positions, to permit the referee to make a recommendation to the commissioner." 1999 AC, R 205.1010(1). A taxpayer may be represented by any person at the informal conference. MCL 205.21(d). The taxpayer and the Department may record the informal conference. *Id*. A taxpayer may withdraw a request for an informal conference at any time. *Id*. The taxpayer may request that the informal conference be conducted telephonically or that the parties submit written documents in support of their positions in lieu of appearing in person. 1999 AC, R 205.1010.

After the Department's Hearings Division conducts an informal conference, it will issue a written decision and order of determination. MCL 205.21(e). The decision must set forth the reasons for the decision and the authority on which it is based. *Id.*

E. Final Assessment

If the Department determines after an informal conference decision is issued that tax is due and payable, the Department will issue a Final Assessment – Bill for Taxes Due ("Final Assessment"), assessing tax, interest and penalty. MCL 205.21(e). The Department must send the Final Assessment by either personal service or certified mail to the taxpayer's last known address. MCL 205.28(1)(a). If the Department sends the Final Assessment to an old and inaccurate address when the Department has the taxpayer's current address on file from the filing of a tax return, the Assessment does not comply with the requirement in MCL 205.28(1)(a) that the Assessment be sent to the taxpayer's last known address. *Bickler v Dep't of Treasury*, 180 Mich App 205; 446 NW2d 644 (1989). However, "a defect in formal notice does not violate due process if notice was in fact given." *Auer v Dep't of Treasury*, 137 Mich App 353, 357; 357 NW2d 696 (1984).

If the taxpayer does not timely request an informal conference after receiving a Notice of Intent to Assess, the Department may issue a Final Assessment, assessing tax, interest and penalty. MCL 205.21(f). The Final Assessment must inform the taxpayer of its right to appeal the Final Assessment under MCL 205.22.

If a taxpayer submits a written request to the Department requesting that an authorized representative receive copies of letters and notices issued by the Department, than the Department is required to send a copy of the Final Assessment to that authorized representative. MCL 205.8; *SMK, LLC v Dep't of Treasury*, 298 Mich App 302 (2012) (Department's Application for Leave to Appeal was granted by the Michigan Supreme Court on March 27, 2013). (See discussion above under "III. Records and Confidentiality.")

The Department may issue a second assessment to a taxpayer who has received and final assessment and paid the tax, penalty and interest due for the same tax period if the statute of limitations under MCL 205.27a has not run on those tax periods. *Tyson Foods v Dep't of Treasury*, 276 Mich App 678; 741 NW2d 579 (2007).

If a taxpayer does not timely appeal a Final Assessment to the Tax Tribunal or Court of Claims, the Final Assessment becomes final and conclusive after 90 days of its issuance and is not reviewable in any court, as long as notice of the Final Assessment was properly given to the taxpayer and its authorized representative, if one was designated. MCL 205.22(4) and (5); MCL 205.8; *SMK, LLC v Dep't of Treasury*, 298 Mich App 302 (2012) (Department's Application for Leave to Appeal granted by the Michigan Supreme Court on March 27, 2013). (See discussion above under "III. Records and Confidentiality.") If a taxpayer does not timely appeal a Final Assessment, the taxpayer loses its right to a refund of any tax, interest or penalty paid. MCL 205.22(5).

F. Appeal to Tax Tribunal or Court of Claims

A taxpayer may appeal an "assessment, decision or order of the department" to the Michigan Court of Claims within 90 days or to the Michigan Tax Tribunal within 35 days. MCL 205.22. If the taxpayer designated an authorized representative to receive copies of letters and notices issued by the Department under MCL 205.8, than the 90-day and 35-day periods under MCL 205.22 do not begin to run until the Department has given notice to both the taxpayer and its authorized representative. MCL 205.22(1); MCL 205.8; *SMK, LLC v Dep't of Treasury*, 298 Mich App 302 (2012) (Department's Application for Leave to Appeal granted by the Michigan Supreme Court on March 27, 2013). (See discussion above under "III. Records and Confidentiality.")

A taxpayer may appeal from either a Notice of Intent to Assess or a Final Assessment; *Montgomery Ward & Co v Dep't of Treasury*, 191 Mich App 674, 679; 478 NW2d 745 (1991). A taxpayer may also appeal "a denial of a claim for refund, or the recovery of taxes paid under protest, or any other decision of the Department, such as denial of tax-exempt status." RAB 1994-1. The Tax Tribunal has interpreted "assessment, decision or order of the department" under MCL 205.22 broadly to include, among other things, Notices of Adjustment:

> The phrase "an assessment, decision, or order of the department" does not reference a specific assessment practice and refers to no specific type or title of departmental "assessment, decision or order." Because the phrase includes assessments for deficiency and claims for refund, it includes an array of documents, such as: a letter denying a taxpayer's request for refund, an audit notice of refund, a notice of adjustment to a return, a denial of credit carryforward, a "decision and order" of the Department's hearings division (see MCL 205.21(2)(e)), or "the "final notice of assessment," (MCL 205.21(2)(f)).

Winget v Michigan Dep't of Treasury, MTT No. 319852, 2007 WL 1175834 (2007).

G. Jeopardy Assessment

The Department may issue a jeopardy assessment, demanding for immediate payment or that an immediate return be filed, if a person owes a tax and the Department determines that the taxpayer "intends quickly to depart from the state or to remove property from this state, to conceal the person or the person's property in this state, or to do any other act tending to render wholly or partly ineffectual proceedings to collect the tax unless proceedings are brought without delay." MCL 205.26. If a jeopardy assessment is issued, the tax is immediately due and payable. *Id.*

H. Anti-Injunction Provision

An injunction will not be issued to stay an assessment. MCL 205.28(1)(b).

VII. Credit or Refund Claim

A. In General

The Department will credit or refund an overpayment of taxes, penalty, and interest erroneously or unjustly assessed or collected. MCL 205.30(1). The submission of an amended tax return constitutes a claim for refund. MCL 205.30(2); *Clarke-Gravely Corp v Dep't of Treasury*, 412 Mich 484; 315 NW2d 517 (1982). The refund claim need not be made in a tax return but may be made by separate request. *NSK Corp v Dep't of Treasury*, 481 Mich 884; 748 NW2d 884 (2008). But taxpayer's written disagreement with the Department's Audit Determination when the taxpayer has paid the tax at issue does not alone constitute a refund claim. *Ford Motor Company v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, Docket No. 306820 (January 8, 2013) (FMC filed an Application for Leave to Appeal to the Michigan Supreme Court on April 9, 2013). Also, a taxpayer's request for an informal conference when the taxpayer has paid the tax at issue does not constitute a refund claim. *Id.*

Interest will accrue on the credit or refund at "the current monthly interest rate of 1 percentage point above the adjusted prime rate per annum from the time the tax was due, and until paid." MCL 205.23(2) and MCL 205.30(1). The interest begins accruing the later of 45 days after the refund claim is filed or 45 days from the date the return was due to be filed, whichever is later. MCL 205.30(3). A response to an audit determination letter, agreeing with the amount of the refund, and demanding interest on the refund amount, constitutes a refund

claim, and interest begins accruing 45 from the date of the response to the letter (if that date is later than 45 days from the date the return was due to be filed). *NSK Corp v Dep't of Treasury*, 481 Mich 884; 748 NW2d 884 (2008).

If a claim for refund or credit is valid, the Department will first apply the amount of overpayment to any known liability. MCL 205.30(2) and MCL 205.30a. The Department will then refund the excess or credit, at the taxpayer's request, the amount to be refunded against a current or subsequent tax liability. *Id*.

An auditor is required to notify a taxpayer of a refund opportunity in a timely manner when the auditor identifies a refund opportunity during an audit. MCL 205.6. The Department must send the taxpayer notice that it is owed a refund, including the amount of the refund. MCL 205.21(3).

B. Appeal of Denied Refund Claim

Within 60 days of a credit audit or refund denial, a taxpayer may submit a written request for an informal conference to the Department to appeal the credit audit or refund denial. MCL 205.21; MCL 205.21a. A taxpayer may also appeal a refund denial to the Tax Tribunal within 35 days, or to the Court of Claims within 90 days after Department's refund denial. MCL 205.22; Revenue Administrative Bulletin 1994-2.

VIII. Payment and Collection of Assessed and Delinquent Taxes, Penalties and Interest

A. Interest

In general, if a taxpayer pays less tax than what should have been paid, makes an excessive claim for refund, or makes an estimated payment that is less than what should have been paid, interest will accrue on the deficiency at "the current monthly interest rate of 1 percentage point above the adjusted prime rate per annum from the time the tax was due, and until paid." MCL 205.23(2). The interest becomes due after notice and informal conference. *Id*.

B. Penalties

Failure to File Tax Return or Pay a Tax. If a taxpayer fails or refuses to timely file a tax return or fails or refuses to timely pay an amount of tax that is due, the taxpayer will be assessed for the amount due. MCL 205.24(1). The taxpayer will also be assessed a penalty of 5% of the tax (or $10, whichever is greater) if the failure is for not more than 2 months, an additional 5% penalty for each additional month or fraction of a month that the amount of tax due remains unpaid, up to a maximum penalty of 25%. MCL 204.24(2). Interest under MCL 205.23 may also be assessed. *Id*. The Department shall waive the failure to file or pay penalty if the failure was due to reasonable cause and not to willful neglect. MCL 205.24(4). See RAB 2005-3 for the Department's position on examples of what constitutes reasonable cause.

Additional Tax Due. If the Department determines based on a tax return, a payment or an audit that a taxpayer did not satisfy a tax liability or that a claim for refund was excessive, the Department will notify the taxpayer that the Department has determined that an additional amount of tax is due. MCL 205.23(1).

Negligence. The Department will impose a 10% penalty (or $10, whichever is greater) if any part of a deficiency or an excessive claim for credit is due to negligence, but without intent to defraud. MCL 205.23(3). The penalty becomes due after notice and informal conference. *Id*. The Department will waive the penalty if the taxpayer satisfactorily demonstrates that the deficiency or excessive claim is due to reasonable cause. *Id*. See RAB 2005-3 for examples of what constitutes reasonable cause.

Negligence is defined by the Department as "lack of due care in failing to do what a reasonable and ordinarily prudent person would have done under the particular circumstances." RAB 2005-3. "A reasonable, prudent person will read the instructions for filing tax returns before making a determination of tax liability." *Id*. Negligence is presumed if a taxpayer has an underpayment of estimated tax or fails to file an amended return after a federal return is modified. *Id*. See RAB 2005-3 for examples of negligence.

Intentional Disregard. The Department will impose a 25% penalty (or $25, whichever is greater) if any part of a deficiency or an excessive claim for credit is due to intentional disregard of the law or of the Department's promulgated rules, but without intent to defraud. MCL 205.23(4). The penalty becomes due after notice and informal conference. *Id*. If a taxpayer successfully disputes the imposition of an intentional disregard penalty, the Department may not then assess a negligence penalty under MCL 205.23(3). *Id*.

Intentional Disregard is defined by the Department as "knowingly and willfully disregarding the laws, rules and instructions published and/or administered by the department without the intent to commit fraud or evade payment of tax." RAB 2005-3. The Department will presume intent when a taxpayer fails to follow specific instructions from the Department regarding the proper reporting of an item of income or deduction. *Id*.

In an unpublished decision, the Court of Appeals addressed the scope of MCL 205.23(4) and determined that a taxpayer may not be assessed a 25% intentional disregard penalty for intentionally disregarding an instruction or position of the Department, or where the taxpayer relied in good faith on the advice of a tax professional. *Wisne v Dep't of Treasury*, unpublished opinion per curium of the Court of Appeals, Docket No. 270633 (May 20, 2008). The Court found that 25% intentional disregard penalty may only be assessed where a taxpayer has intentionally disregarded a law or promulgated rule, and not an RAB or instruction, and further found that good faith reliance on the advice of a tax professional precludes imposition of the intentional disregard penalty. *Id.*

Fraud. The Department shall impose a 100% penalty if any part of a deficiency or an excessive claim for credit is due to fraudulent intent to evade a tax. MCL 205.23(5). The Department shall also impose the 100% fraud penalty if a taxpayer seeks a refund for a fraudulent claim. *Id*. The penalty becomes due after notice and informal conference. *Id*.

Fraud is defined by the Department as "knowingly and willfully acting in a manner to commit fraud, such as: failing or refusing to file a return, or filing a false return with the intent to evade payment of tax or part of a tax; claiming a false refund or a false credit; or aiding, abetting or assisting another in an attempt to evade payment of a tax or part of a tax, claim a false refund or claim a false credit." RAB 2005-3. Fraud requires an overt, deceptive act by the taxpayer: "a

purposeful act of a taxpayer to disguise, present and/or omit facts in such a way as to put forward a false situation." *Id.* See RAB 2005-3 for indicators of fraud and examples of fraud.

Frivolous Appeal of Notice of Intent to Assess. If a taxpayer's appeal of a Notice of Intent to Assess is frivolous or pursued by the taxpayer with an objective to delay or impede the administration of tax, the Department may issue a penalty of the greater of 25% of the amount of tax protested or $25.00. MCL 205.21(3).

C. Compromising Penalty and Interest

Although the Department cannot compromise or reduce the amount of tax due, a compromise of penalties and interest may be made. MCL 205.28(1)(e).

D. Officer Liability

Michigan imposes officer liability under MCL 205.27a(5):

> If a corporation, limited liability company, limited liability partnership, partnership, or limited partnership liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers, members, managers, or partners who the department determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments is personally liable for the failure. The signature of any corporate officers, members, managers, or partners on returns or negotiable instruments submitted in payment of taxes is prima facie evidence of their responsibility for making the returns and payments. The dissolution of a corporation, limited liability company, limited liability partnership, partnership, or limited partnership does not discharge an officer's, member's, manager's, or partner's liability for a prior failure of the corporation, limited liability company, limited liability partnership, partnership, or limited partnership to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act.

E. Voluntary Disclosure Agreement

The Voluntary Disclosure Act provides that a taxpayer that has not filing returns and that has not had any previous contact with the Department may be eligible to enter into a voluntary disclosure agreement with the Department, if certain other requirements are met. MCL 205.30c. If a taxpayer meets and is eligible to enter into a voluntary disclosure agreement, the taxpayer must file all reports, and returns and pay tax and interest for a limited lookback period of four years for MBT liabilities. *Id*. The taxpayer will not be assessed penalties and will not be required to file returns beyond the 4-year lookback period in exchange for future tax compliance. *Id*.

F. Felony or Misdemeanor for Violating Revenue Act

A person may be guilty of a felony, punishable by a fine of not more than $5,000 and/or up to 5 years in prison, for violating any of the following with an intent to defraud or to evade or assist in defrauding or evading the payment of tax:

> "(a) Fail or refuse to make a return or payment within the time specified, make a false or fraudulent return or payment, or make a false statement in a return or payment.
>
> "(b) Aid, abet, or assist another in an attempt to evade the payment of a tax, ora part of a tax, or file a false claim for credit as provided in statutes administered under this act.
>
> "(c) Make or permit to be made for himself or herself or for any other person a false return or payment, a false statement in a return or payment, or a false claim for credit or refund, either in whole or in part."

MCL 205.27(1) and (2).

A person may be guilty of perjury if the person "knowingly swears to or verifies a false or fraudulent return or a false or fraudulent payment, or a return or payment containing a false or fraudulent statement, with the intent to aid, abet, or assist in defrauding the state." MCL 205.27(3).

A person may be guilty of a misdemeanor, punishable by up to a year imprisonment and/or a fine of not more than $1,000, if the person knowingly violates any other provision of the Revenue Act (MCL 205.1 *et seq*).

G. Collection

Taxes, penalty and interest due become a lien against the taxpayer's property and rights of property, real and personal, tangible and intangible. MCL 205.29 and MCL 205.29a. If the Department makes a demand for payment of a tax, unpaid account, or any amount due to the State of Michigan, and the taxpayer does not pay the amount demanded within 10 days or take steps to have the Department's demand reviewed, the Department may issue a warrant. MCL 205.25(1). The Department may levy on the taxpayer's property and sell the real and personal property found within the State for the amount of tax, penalty and interest due, and the cost of executing the warrant. *Id*. If a person disregards the levy, the taxpayer may be personally liable to the State for the value of the property or rights not surrendered. MCL 205.25(2). If the person fails to surrender property or rights to property without reasonable cause, the person may be subject to a penalty equal to 50% of the amount recoverable under MCL 205.25(2). MCL 205.25(3). MCL 205.25(4) provides for certain exemptions from levy. An injunction will not be issued to stay collections. MCL 205.28(1)(b).

MICHIGAN STATE TAX PRACTICE AND PROCEDURE: MICHIGAN COURT OF CLAIMS' LITIGATION

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I. Introduction

Following a state tax audit, assessment, and informal conference, a taxpayer is faced with the decision of whether to appeal an assessment or a denial of a refund claim issued by the Michigan Department of Treasury (the "Department") to the Michigan Court of Claims or to the Michigan Tax Tribunal. This article discusses the steps for pursuing a refund or appealing an assessment through the Court of Claims.

A taxpayer must pay the amount of tax, interest and penalties in dispute in order to perfect an appeal to the Court of Claims, a "pay to play" venue. The procedures for pursuing a Court of Claims action against the Department are generally governed by the Court of Claims Act (MCL 600.6401 *et seq.*, Chapter 64 of the Revised Judicature Act, MCL 600.101 *et seq.*), the Revenue Act (MCL 205.1 through MCL 205.31), and the Michigan Court Rules. As a function of the Ingham County Circuit Court, the Court of Claims' operates within Ingham County.

II. Jurisdiction of the Court of Claims

Generally, the State of Michigan ("the state") and its departments, including the Department of Treasury, are protected from direct action suit by the doctrine of sovereign immunity. *Manion v State*, 303 Mich 1; 5 NW2d 527 (1942). The Court of Claims Act is the state's controlling legislative expression of its waiver of sovereign immunity. *Greenfield Const Co Inc v Michigan Dep't of State Highways*, 402 Mich 172; 261 NW2d 718 (1978). Accordingly, an aggrieved taxpayer may file suit in the Court of Claims against the Department of Treasury if the suit is timely and appropriate under the Revenue Act (MCL 205.1 *et seq.*).

Article 6, Section 1 of Michigan's Constitution (Const 1963) provides:

> The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.

The Michigan Court of Claims was created by the legislature as a function of the Ingham County Circuit Court (30th judicial circuit). MCL 600.6404. As a legislative creation, the Court of Claims only has the explicit and limited statutory powers delegated to it. *Feliciano v State Dep't*

of Natural Resources, 97 Mich App 101; 293 NW2d 732 (1980); *Dunbar v Dep't of Mental Health*, 197 Mich App 1; 495 NW2d 152 (1992).

Generally, circuit courts have original jurisdiction over civil claims and remedies, unless another court otherwise has exclusive jurisdiction over a particular area of law. MCL 600.605. The Court of Claims has exclusive jurisdiction over claims made against the state under the Court of Claims Act, except under the following circumstances. MCL 600.6419. First, the Court of Claims does not have jurisdiction over a matter if the taxpayer could obtain an adequate remedy by filing the claim in federal court. MCL 600.6440. Second, the Court of Claims will only have jurisdiction over a claim for less than $1,000 if it is authorized by the state administrative board. MCL 600.6419(1). "Claims against the state" under MCL 600.6419 includes all other claims against any of the state's departments, commissions, boards, institutions, arms, or agencies. MCL 600.6419.

A complaint for money damages against the state, whether or not the complaint includes a request for equitable relief or declaratory relief, must be filed with the Court of Claims. MCL 600.6419; MCL 600.6419a; *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763; 664 NW2d 185 (2003). The Court of Claims also has jurisdiction if the complaint is for equitable relief or declaratory relief only against the state for actions based on a tort or a contract. MCL 600.6419a; *Parkwood Ltd Dividend Housing Ass'n*, 468 Mich at 772. The court of claims has concurrent jurisdiction over claims for equitable and declaratory relief with the Circuit Court "when ancillary to a claim filed pursuant to section 6419." MCL 600.6419a. When determining whether the Court of Claims has exclusive jurisdiction, the nature of the claim, rather than the claim as set forth in the complaint, governs. *Id.*

The Court of Appeals provided guidance on what is considered "ancillary" in *People v Young (on remand)*, 220 Mich App 420, 435; 559 NW2d 670 (1996):

> This Court has previously stated that ancillary jurisdiction should attach where: (1) the ancillary matter arises from the same transaction that was the basis of the main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated. [*In re Property Held by Detroit, Dep't of Police v Benson*, 141 Mich 302, 306-307; 367 NW2d 376 (1985)]

An appeal of any tax administered by the Department may be brought in the Court of Claims. MCL 205.20; MCL 205.22. Taxes that may be appealed to the Court of Claims include taxes administered under the following:

- Sales Tax Act (MCL 205.51 et seq.). MCL 205.59(1).
- Use Tax Act (MCL 205.91 et seq.). MCL 205.100(1).
- Severance Tax on Oil or Gas Act (MCL 205.301 et seq.). MCL 205.306(1).
- Tobacco Products Tax Act (MCL 205.421 et seq.). MCL 205.433(1).
- Income Tax Act of 1967 (MCL 206.1 et seq.), including the Michigan Corporate Income Tax, MCL 206.601-.713 (effective January 1, 2012 by 2011 PA 38). MCL 206.402 and MCL 206.693.
- Motor Carrier Fuel Tax Act (MCL 207.211 et seq.). MCL 207.216a(1).
- Airport Parking Tax Act (MCL 207.371 et seq.). MCL 207.375(2).
- State Real Estate Transfer Tax (MCL 207.501 et seq.). MCL 207.536.
- The excise tax imposed under the State Convention Facility Development Act (MCL 207.621 et seq.). MCL 207.625(2).
- Excise tax imposed under the Stadia or Convention Facility Financing Act (MCL 207.751 et seq.) *if* administered by the Department in accordance with the Revenue Act (MCL 205.1 et seq.). MCL 207.754(1).
- Motor Fuel Tax Act (MCL 207.1001 et seq.). MCL 207.1145.
- Single Business Tax Act (MCL 208.1 et seq.) (in effect through December 31, 2007, by 2006 PA 235). MCL 208.80(1).
- Michigan Business Tax Act (MCL 208.1101 et seq.) (in effect from January 1, 2008 through December 31, 2011, by 2007 PA 236 and 2011 PA 39). MCL 208.1513(1).

The Court of Claims does not have jurisdiction over an appeal of property tax administered under the General Property Tax Act (MCL 211.1 *et seq.*). The Michigan Tax Tribunal has exclusive jurisdiction over property tax appeals under MCL 205.731.

The Court of Claims has exclusive jurisdiction over counterclaims made by the state related to claims made against the state. MCL 600.6419. However, the Court of Claims will not have jurisdiction over the Department's counterclaims if, although based on the same tax years and sales of accounts as the taxpayer's claims, they are based on a new and alternate theory of liability different from the theory upon which the Department based the assessment. *Montgomery Ward & Co v Dep't of Treasury*, 191 Mich App 674, 682; 478 NW2d 745 (1991). A counterclaim raised by the Department based on an entirely different theory of liability violates the taxpayer's "rights to notice of assessment, the right to an informal conference, the amount of tax, interest and penalty, and the reasons and authority for the assessment." *Id.*

III. Procedural Requirements for Initiating a Court of Claims' Action

A. Deadlines for Filing Court of Claims' Action

In order to perfect an appeal of the contested portion of an assessment, decision, or order of the Department to the Court of Claims, a complaint must be filed with the Court of Claims within 90 days of the assessment, decision or order. MCL 205.22(1). If the taxpayer designated an authorized representative to receive copies of letters and notices issued by the Department under MCL 205.8, than the 90-day period under MCL 205.22 does not begin to run until the Department has given notice to both the taxpayer and its authorized representative. MCL 205.22(1); MCL 205.8; *SMK, LLC v Dep't of Treasury*, 298 Mich App 302 (2012) (Department's Application for Leave to Appeal granted by the Michigan Supreme Court on March 27, 2013).

A taxpayer may appeal from the following:

1. A final determination of a tax deficiency, or
2. The denial of a claim for a refund, or
3. The recovery of taxes paid under protest, or
4. Any other decision of the Department, such as denial of tax-exempt status.

Revenue Administrative Bulletin 1994-2.

An assessment, decision, or order need not be final to be appealed. A taxpayer may appeal from a notice of intent to assess issued by the Department. *Montgomery Ward & Co v Dep't of Treasury*, 191 Mich App 673, 681; 478 NW2d 745 (1991). An informal conference with the Department of Treasury is not a jurisdictional prerequisite to filing a complaint with the Court of Claims. *Id.* When a taxpayer has submitted a refund request to the Department, a letter from the Department denying the taxpayer's refund request is a "final decision" that may be appealed, even if the letter does not advise the taxpayer of its right to appeal. *Curis Big Boy, Inc v Dep't of Treasury*, 206 Mich App 139; 520 NW2d 369 (1994).

In a decision reviewing the validity of an assessment, the Michigan Tax Tribunal determined that in order for an assessment, decision or order of the Department "to satisfy the demands of the due process clause [it must], on its face, contain: (1) sufficient information of the set of facts and reasons causing the deficiency; (2) the amounts of the deficiencies, sufficient to allow a reasonable estimate of liability from those facts; (3) a reliable means of determining the taxpayer's appeal period; and (4) an explanation of the right of appeal." *Winget v Michigan Dep't of Treasury*, MTT No. 319852, 2007 WL 1175834 (2007). In *Winget*, the Tax Tribunal interpreted "assessment, decision or order of the department" under MCL 205.22 broadly to include, among other things, Notices of Adjustment:

> The phrase "an assessment, decision, or order of the department" does not reference a specific assessment practice and refers to no specific type or title of departmental "assessment, decision or order." Because the phrase includes assessments for deficiency and claims for refund, it includes an array of

documents, such as: a letter denying a taxpayer's request for refund, an audit notice of refund, a notice of adjustment to a return, a denial of credit carryforward, a "decision and order" of the Department's hearings division (see MCL 205.21(2)(e)), or "the "final notice of assessment," (MCL 205.21(2)(f)).

There are two avenues for claiming a refund from which the taxpayer may appeal to the Court of Claims if the Department denies the refund claim. A taxpayer may claim a refund of an amount paid to the Department within four years from the date set for the filing of the original return, subject to statutory suspension of the four-year statute of limitations. MCL 205.27a(2), (3). However, if the "claim for refund [is] based upon the validity of a tax law based on the laws or constitution of the United States or the state constitution of 1963," the taxpayer must claim the refund within 90 days of the date set for filing the return at issue. MCL 205.27a(6). In either case, if the refund claim is denied, a complaint must be filed with the Court of Claims to appeal the refund denial within 90 days of the denial. MCL 205.22(1). However, if the taxpayer designated an authorized representative to receive copies of letters and notices issued by the Department under MCL 205.8, and the Department did not send the refund denial to the taxpayer's authorized representative, the taxpayer could assert that the 90-day period under MCL 205.22 does not begin to run until the Department has given notice to both the taxpayer and its authorized representative. MCL 205.22(1); MCL 205.8; *SMK, LLC v Dep't of Treasury*, 298 Mich App 302 (2012) (Department's Application for Leave to Appeal granted by the Michigan Supreme Court on March 27, 2013).

B. Tax Must be Paid Before Court of Claims' Action is Filed

The Court of Claims is a "pay to play" venue: the taxpayer "shall first pay the tax, including any applicable penalties and interest, under protest and claim a refund as part of the appeal." MCL 205.22(2); see also *Western Elec Co v State*, 312 Mich 582; 20 NW2d 734 (1945) (determining that the requirement to pay the contested tax before filing a claim with the Court of Claims was not a violation of the taxpayer's Constitutional right to due process and equal protection). The taxpayer must pay the uncontested portion of the assessment, order or decision before filing a complaint with the Court of Claims. MCL 205.22(1).

C. Other Filing Requirements

A complaint must conform to the Michigan Court Rules and the Local Rules of the Thirtieth Judicial Circuit (Ingham County). MCL 600.6434(1); see MCR 2.110 through MCR 2.114. A Court of Claims' case is initiated by filing a complaint with the Court. MCL 600.1901. A complaint filed with the Court of Claims must be verified by the taxpayer. MCL 600.6434(2). However, verification is not a jurisdictional prerequisite and can be cured. *Arnold v Dep't of Transportation*, 235 Mich App 341, 346; 597 NW2d 261 (1999).

Upon filing a complaint, the clerk of the Court issues a summons. MCL 600.1905; see also MCR 2.102. Actions filed against the Department of Treasury must be served on the Department of Treasury. MCL 600.6434(3); see also MCL 600.1910 and MCL 600.2051(4).

When filing a complaint with the Court of Claims, the taxpayer must also file with the Court an extra copy for the clerk to transmit to the attorney general. MCL 600.6434(4). The

attorney general or an assistant attorney general will represent the Department of Treasury. MCL 600.6416. If a copy for the attorney general is not provided, the filing may be rejected.

If a taxpayer commits a fraud or attempts to commit a fraud against the state in pursuing a claim, the taxpayer may forever be barred from pursuing that claim. MCL 600.6470.

IV. Practice Before the Court of Claims

In general, the Michigan Court Rules and the Local Rules of the Thirtieth Judicial Circuit (Ingham County) apply to matters before the Court of Claims. MCL 600.6422. With all pleadings and papers filed with the clerk of the Court of Claims, the taxpayer must also file with the Court an extra copy for the clerk to transmit to the attorney general. MCL 600.6434(4). If a copy for the attorney general is not provided, the filing may be rejected. Note that in addition to providing a copy for the attorney general to the Court of Claims, the taxpayer must serve copies of all pleadings and papers directly on the attorney general if the attorney general has filed an appearance in the action. MCR 2.107(A)(1). Service on the attorney general may be made by handing the pleading to the attorney general or to the person in charge of the attorney general's office or mailing it to the attorney general's business address. MCR 2.107(C). The parties may agree that service by e-mail is acceptable by filing a stipulation with the court to that effect. MCR 2.107(C)(4). Proof of service must be filed with the court. MCR 2.107(D).

Pleadings must conform to the Michigan Court Rules and the Local Rules of the Thirtieth Judicial Circuit (Ingham County). MCL 600.6434(1).

A. Discovery.

In general, the Michigan Court Rules governing discovery apply to Court of Claims' actions. MCR 2.301 through MCR 2.316. The Court of Claims has the power to subpoena witnesses and to require the production of documents or other evidence. MCL 600.6428. The Court of Claims has the power to hold a party in contempt. MCL 600.6428.

Generally, when information is sought from the state, it can be requested and obtained pursuant to a Freedom of Information Act ("FOIA") Request. MCL 15.231 *et seq.* However, a Court of Claims' action constitutes a "civil action" under MCL 15.243(1)(v), and records and information related to a civil action are exempt from disclosure pursuant to a FOIA request. Instead, discovery procedures set forth in the Michigan Court Rules must be followed. The taxpayer may also file a motion requesting the Court of Claims to invoke its power to "call upon any officer, department, institution, board, arm or agency of the state government for any examination, information or papers pertinent to the issues involved in any case then pending before the court." MCL 600.6467.

Depositions may be taken in the same manner taken in general circuit court actions. MCL 600.6425. However, the deponent residing more than 50 miles from where court is held is not sufficient to use the deposition for any purpose. *Id.*

B. Trial.

Court of Claims' cases are heard by judges by way of a bench trial, not juries. MCL 600.6443. A taxpayer does not have a right to a jury trial in the Court of Claims. *Freissler v State*, 53 Mich App 530; 220 NW2d 141 (1974). The Court may grant a new trial for the same reasons and under the same conditions a new trial would be granted in a non-jury trial circuit court case. MCL 600.6443.

V. Judgments Issued by Court of Claims

A judgment of the Court of Claims is final, unless timely appealed. MCL 600.6419(2). In general, judgments issued by the Court of Claims are governed by the Michigan Court Rules, MCR 2.601 through 2.620. The doctrine of res judicata applies to claims resolved in a final judgment by the Court of Claims. MCL 600.6419(2).

The Court may issue a judgment without conducting a trial. The Court may issue a judgment on stipulated facts submitted by the parties. MCL 600.6437. Upon a motion of a party, the Court may issue a judgment dismissing a case or entering summary disposition. MCR 2.504 and MCR 2.116.

Calculation of pre-judgment and post-judgment interest in Court of Claims' cases is provided for in the Revenue Act at MCL 205.30(1) and the Revised Judicature Act at MCL 600.6455. MCL 205.30(1) states:

> The department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under section 23 for deficiencies in tax payments.

MCL 600.6455 provides for post-judgment interest at a 1% over prime floating rate and the interest is compounded.

When a judgment against the state is final, the clerk of account notifies the treasurer and certifies the judgment for payment. MCL 600.6458(2). If the state has sufficient unencumbered funds, the judgment is paid. *Id*. If there is not sufficient unencumbered funds to pay the judgment, the clerk issues a voucher upon the request of the treasurer against an appropriation made by the legislature. The amount due is reported to the legislature, and the judgment is paid as soon as funds are available. *Id.*

If the Court renders a decision that a balance is due from the taxpayer to the state, then the Court has the power to issue writs of execution or garnishment. MCL 600.6419(2).

VI. Anti-Injunction Provision

The Court of Claims may not issue an injunction "to stay proceedings for the assessment and collection of tax." MCL 205.28(1)(b). However, a court may issue an injunction if the conduct of the Department of Treasury sought to be enjoined is not authorized. *Stengenga v Dep't of Treasury*, 179 Mich App 307; 445 NW2d 495 (1989) (overruled on other grounds by *Brown v Yousif*, 445 Mich 222; 517 NW2d 727 (1994)) (citing to *Troy Industrial Catering Service v Dep't of Treasury*, 105 Mich App 86; 307 NW2d 345 (1981)).

VII. Costs Allowed

Costs in the Court of Claims are governed by MCL 600.6449(1) which states:

> If the state shall put in issue the right of claimant to recover, the court may allow costs to the prevailing party from the time of the joining of the issue. The costs, however, shall include only witness fees and officers' fees for service of subpoenas actually paid, and attorney fees in the same amount as is provided for trial of cases in circuit court.

VIII. Appeal from a Court of Claims' Decision

Appeal from a Court of Claims' final order or judgment must be made to the Court of Appeals. MCL 600.6446(1). An appeal of a Court of Claims' decision to the Court of Appeals is by right. MCL 205.22. The procedure for appealing a Court of Claims' final order or judgment is the same as the procedure for appealing a final order or judgment of the circuit court. MCL 600.6446(2).

Exhibit B
Choice of Forum

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I. **In General.** A taxpayer aggrieved by an assessment, decision or order of the Department may appeal to the Tax Tribunal within 35 days or the Court of Claims within 90 days after the assessment, decision or order. MCLA 205.22(l). Failure to make a timely appeal may close the assessment to further appeal. MCLA 205.22(4), (5).

Practitioner Tips: Check the date of the assessment, decision or order closely. The Tax Tribunal is very firm in dismissing cases for lack of jurisdiction when appeals are made outside of the 35 day window. See, *Elian 2 Corp. v. Department of Treasury*, Docket Number 304353, Court of Appeals of Michigan, July 24, 2012 (unpublished). Also, Notices to be appealed must describe the type of tax, amount of liability and tax periods with specificity. *Winget v Dep't of Treasury*, MTT Docket No. 319852 (issued April 4, 2007)

A. **Michigan Tax Tribunal.** Appeals to the Tax Tribunal must be made within 35 days after the date of the contested assessment decision or order and the taxpayer must have paid any uncontested portion of tax. MCLA 205.22(1). The Tax Tribunal will dismiss cases for failure to pay this uncontested portion. See, *Anderson v. Department of Treasury*, Docket Numbers 303470, 305074, Court of Appeals of Michigan, August 9, 2012 (unpublished).

The Tax Tribunal is an administrative body currently housed under the State of Michigan Administrative Hearing System. Mich Exec Order No 2011-4. It consists of seven members, appointed by the Governor and, under the Tax Tribunal Act, these members must consist of lawyers, appraisers, accountants and assessors. In other words, Tribunal members tend to have prior familiarity with state and local tax matters, especially real and personal property valuation and assessment.

Cases begin in the Tax Tribunal with the filing of a petition, permit time for discovery and pre-trial settlement and, if not settled before hearing with a Tribunal Member, will afford the parties an opportunity to be heard and present witnesses and evidence in a formal hearing setting. The Member assigned to a case and hearing will issue a written Opinion and Order to the parties that may be appealed to the Michigan Court of Appeals as of right under MCLA 205.753(1).

Practitioner's Tip: The Michigan Tax Tribunal has its own Rules, found on the Tribunal website, that govern filings, fees, motion and hearing practice and other matters. However, when the Tax Tribunal Rules do not specifically address an issue, the Michigan

Rules of Court control. The Tax Tribunal Rules provide for procedures, and evidentiary practices and standards (at least for Entire Tribunal matters, where higher dollar value property tax appeals and other types of state tax appeal will reside), that are very similar to those found in the Michigan Court Rules.

B. **Court of Claims.** The Court of Claims was created as a function of the circuit court for the thirtieth judicial circuit in the Court of Claims Act, MCLA 600.6401 *et seq*. Appeals to the Court of Claims must be made within 90 days after the assessment, decision or order and the taxpayer in question must have paid all tax, penalty and interest. MCLA 205.22(1),(2). Understandably, the different amounts of time in which to appeal, countered with the different prepayment requirements, in the Tax Tribunal and Court of Claims drive many taxpayer decisions regarding choices of litigation forum.

The Court of Claims resides in Ingham County and its judges are drawn from the Ingham County Circuit Court. In other words, Court of Claims judges are unlikely to specialize in state and local tax matters or spend a majority of their time on such cases.

Practitioner's Tip: Practice in the Court of Claims follows the Michigan Court Rules and Rules of Evidence. There is no option for a jury hearing or trial, though parties may arrive at the Court to find that prior matters heard that day by the assigned Court of Claims judge, in his or her Ingham County Court guise, involved jury trials (e.g., an Ingham County Circuit Court criminal jury trial may be held before lunch and a Court of Claims motion hearing for a state tax dispute in the afternoon).

Disputes not resolved by pre-hearing settlement at the Court of Claims will eventually be heard and decided by the assigned Court of Claims judge, who will issue and Opinion and Order that may be appealed as of right to the Michigan Court of Appeals under MCR 7.203(A)(1).

Exhibit C
Tribunal Rules Summary

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHAEL ZIMMER
EXECUTIVE DIRECTOR

STEVE ARWOOD
DIRECTOR

TRIBUNAL RULES SUMMARY
April 5, 2013

As indicated in the Tribunal's March 21, 2013, ***ListServe*** message announcing this meeting, the Tribunal's revised Rules of Practice and Procedure became effective upon its filing with the Secretary of State's office on March 20, 2013, and are being applied to both new and existing appeals.

Although the Rules were specifically revised to facilitate electronic filing, electronic filing is currently unavailable, as the Tribunal's e-filing system is still under development. Other issues were, however, also addressed by the revisions and those key changes are as follows:

Filing of Entire Tribunal Petitions

- Petitioners are required to file their Entire Tribunal petitions and then wait for the issuance of the Notices of Docket Number to serve the petitions. See TTR 221.

  Once the Notice of Docket Number has been issued, the petitioner must "note" (i.e., record) the docket number on the petition and serve the petition on all required parties (i.e., assessor; city clerk, in the case of cities; township supervisor or clerk, in the case of townships; etc.) within 45 days of the issuance of the Notice of Docket Number. See TTR 221 and MCL 205.735a.

- To complete the filing of the petition, the petitioner is required to submit proof to the Tribunal within 45 days of the issuance of the Notice of Docket Number evidencing service of the petition on all required parties (i.e., a proof of service). Failure to submit the proof of service within 45 days of the issuance of the Notice of Docket Number will result in the dismissal of the case. See TTR 221.

- In addition to indicating the docket number assigned to the case, the Notice of Docket Number will also indicate what fee was paid for the filing of the

petition and what filing fee was required. If the full amount of the required filing fee was not paid, the petitioner will have 21 days from the issuance of the Notice of Docket Number to pay the full amount or the case will be dismissed. See TTR 219 and 221.

Filing of Small Claims Petitions

- The Tribunal is no longer accepting appeal letters or mailing petition and answer forms to parties in Small Claims cases. See TTR 277 and 279 and MCL 205.735a. ***Small Claims petition forms are available on the Tribunal's website at*** www.michigan.gov/taxtrib. (The forms are not fillable.)

  Once a petition has been received by mail, a Notice of Docket Number will be sent to both parties and the Respondent will have 28 days after the issuance of Notice of Docket Number to file and serve its answer. (*The process will vary slightly once electronic filing is available*.) ***Small Claims answer forms are also available on the Tribunal's website***. (The forms are not fillable.) A copy of the petition will be attached to the Notice of Docket Number sent to the respondent.

- As indicated above, the Notice of Docket Number will also indicate what fee was paid for the filing of the petition and what filing fee was required. If the full amount of the required filing fee was not paid, the Petitioner will have 21 days from the issuance of the Notice of Docket Number to pay the full amount or the case will be dismissed.

- Documentation attached to a petition will not be attached to the Notice of Docket Number or otherwise sent to the respondent. Rather, the petitioner will be required to serve a copy of that documentation on the respondent at least 21 days in advance of the hearing, as provided by TTR 287.

Witnesses

- The Prehearing Conference and Scheduling Order will no longer require or provide for the filing of witness lists. Rather, parties are required to identify their witnesses in their prehearing statements. See TTR 237. Further, post-

valuation disclosure discovery is being expanded to include discovery of witnesses identified in the prehearing statements.

The date for the filing and exchange of prehearing statements is set by the Prehearing General Call Order. Failure to timely file and serve a prehearing statement will result in the commencement of the prehearing conference as a show cause hearing to determine whether that party will be permitted to offer any witnesses at the hearing. See TTR 231 and MCL 205.732.

- Although the Rule pertaining to prehearing statements (i.e., TTR 231) is currently effective, the Tribunal will be enforcing this rule beginning April 15, 2013. A ***ListServe*** will be issued on April 15, 2013, indicating that the Rule will be effective for prehearing statements to be filed after that date.

Filing Fees

- Fees must be paid "***separately***" for ***each*** filing. See TTR 205. As a result, the Tribunal will ***no*** longer accept a single check for the payment of multiple filing fees. If a single check is submitted for the payment of multiple filing fees, the Tribunal will credit the amount to the first case listed and issue notices of docket number or notices of no action, as appropriate, for the other cases indicating that no filing fees were paid for those cases.

- MCL 205.762 provides for a reduction in fees for the filing of Small Claims valuation appeals of residential property only (i.e., ½ of the filing fees paid in the Entire Tribunal). As a result, petitioners filing Small Claims valuation appeals for property other than residential property are required to pay the full amount of the filing fees paid in the Entire Tribunal. Residential properties are defined in MCL 205.762.

- Fees have been added for the filing of classification appeals in both the Entire Tribunal (see TTR 217) and the Small Claims Division (see TTR 267) and fees for the filing of a poverty appeal only in the Small Claims Division (see TTR 267) have been eliminated.

Motions

- The Tribunal will no longer defect a party for failing to pay a fee or the "***correct***" fee required for the filing of a motion. See TTR 225. Rather, the Tribunal will issue a Notice of No Action.

  By way of example, a petitioner files a motion to amend to include a subsequent tax year, but does not include the values required for determining the amount in dispute. The petitioner also pays a filing fee that is less than the maximum amount that could be paid. As a result, the Tribunal is unable to determine whether the "***correct***" filing fee was paid and a Notice of No Action would be issued.

  The party filing the motion would then be required to pay the full filing fee required or revise the motion to indicate that the "correct" filing fee was paid within 21 days of the issuance of the Notice of No Action. Failure to pay the full required filing fee or revise the motion within 21 days would result in No Action being taken on the motion and require the refilling of the motion with required filing fee.

- The Tribunal's current treatment of motions for immediate consideration and motions for reconsideration has been codified. See TTR 225 and 257. More specifically, motions for immediate consideration and the motions for which immediate consideration is being sought will be acted upon within 7 days of the filing of the motion for immediate consideration if the motion indicates that the opposing party has been contacted and whether the opposing party will be filing a response to the underlying motion or motions. As for motions for reconsideration, responses to such motions are precluded absent leave of the Tribunal. See also MCR 2.119.

Petitions

- Petitions can cover multiple parcels of personal property. See TTR 227.

Appearances

- Appearances will now require the addition of a valid email address for purposes of facilitating e-filing and electronic service of pleadings and documents other than petitions.

Expert Valuation Witnesses

- The limitation on the testimony of valuation witnesses has been clarified and requires the submission of a valuation disclosure signed by the witness and containing that witness' value conclusions and the basis of those conclusions. See TTR 255.

Stipulations

- The requirement for parties to file their stipulations on a Tribunal form or a form that is in substantial compliance with the Tribunal form has been expanded to include both Entire Tribunal and Small Claims cases. See TTR 249 and 281. ***Entire Tribunal and Small Claims stipulation forms for both property and non-property tax matters are available on the Tribunal's web-site***.

Counsel Conferences

- The requirement to conduct counsel conferences has been eliminated.

Defaults

- A party will be required to file motions to set aside default, pay the required filing fee, and show good cause to set aside the default whenever that party is placed in default through the entry of an order.

Costs

- The limitation on awarding costs to prevailing parties only has been stricken. See TTR 209.

RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
MICHAEL ZIMMER
EXECUTIVE DIRECTOR

STEVE ARWOOD
DIRECTOR

April 17, 2013

Dear Tax Tribunal Practitioner:

As indicated in the March 21, 2013, ***ListServe***, meetings were conducted in Novi on April 5, 2013, and Grand Rapids on April 12, 2013, to discuss the recent revisions to the Tribunal's Rules of Practice and Procedure. Both meetings were well attended and the Tribunal would once again like to thank the Novi City Assessor, Glenn Lemmon, and the Grand Rapids City Assessor, Scott Engerson, for their hospitality in hosting those meetings. More importantly, *the Tribunal will, as indicated during those meetings, be enforcing the Rule pertaining to the inclusion of the parties' final witness lists in the required prehearing statements (i.e., TTR 231) effective for prehearing statements to be filed after the date of this* ***ListServe***. Further, the Tribunal is, based on comments received at those meetings, clarifying the treatment of petitions and motions when the filing fees required by TTR 227, 219, 225, 261, 267, and 277 have not been properly paid as follows:

Petitions

- If a letter is filed to initiate an appeal in either the Small Claims Division or the Entire Tribunal, the Tribunal will issue a *Notice of No Action* indicating only a petition, filed by the statutory deadline, can initiate an appeal before the Tribunal.

- If a petition is filed to initiate an appeal in either the Small Claims Division or the Entire Tribunal and the required filing fee was paid, the Tribunal will docket the petition and issue a Notice of Docket Number.

- If a petition is filed to initiate an appeal in either the Small Claims Division or the Entire Tribunal and a filing fee was required but not paid, the Tribunal will return the petition and issue a *Notice of No Action* indicating that the petition with required filing fee must be submitted by the required statutory deadline for the filing of that appeal.

MICHIGAN TAX TRIBUNAL
P.O. BOX 30232 • LANSING, MICHIGAN 48909
www.michigan.gov/taxtrib • (517)636-7551

- If a petition is filed to initiate an appeal in either the Small Claims Division or the Entire Tribunal, a filing fee was paid, and it is clear that the fee paid was insufficient for the filing of that appeal, the Tribunal will docket the petition and issue a *Notice of No Action* indicating that the petition is not properly pending and that the appeal will be administratively dismissed if the required filing fee is not paid within 21 days of the issuance of the *Notice*.

- If a petition is filed to initiate an appeal in either the Small Claims Division or the Entire Tribunal, a filing fee was paid, and it is not clear whether the fee paid was sufficient for the filing of the petition, the Tribunal will docket the petition and issue a *Notice of Docket Number*. If it is later determined that the filing fee was insufficient, a default order would be issued requiring the petitioner to both pay the required filing fee and file a motion to set aside default with appropriate filing fee. Failure to timely cure the default would result in the dismissal of the appeal.

Motions

- If a motion is filed, a filing fee was required, and the fee was not paid, the Tribunal will issue a *Notice of No Action* indicating that the motion is not properly pending and that the Tribunal will not consider the motion (i.e., take no action) unless the required filing fee is paid within 21 days of the issuance of the *Notice*. In addition to the payment of the required filing fee, the movant will also be required to submit proof that they have notified the opposing party that the filing fee has been paid so as to trigger the 21-day time period for the filing of a response to the Motion. Failure to submit the required filing fee and proof will require the re-filing of the motion with appropriate filing fee.

- If a motion is filed, a filing fee was required, and the fee paid was insufficient, the Tribunal will issue a *Notice of No Action*, as indicated above, requiring the payment of the full filing fee.

- If a motion to amend to include a subsequent tax year is filed, a filing fee was paid, and it is not clear whether the required filing fee was paid (i.e., the motion does not provide the necessary amounts in dispute), the Tribunal will issue a *Notice of No Action* indicating that the motion is not properly pending and that the Tribunal will not consider the motion (i.e., take no

action) unless a revised motion is filed indicating the amounts in dispute and/or the full required filing fee is paid. In addition to the filing of a revised motion and/or payment of the required filing fee, the movant will also be required to submit proof that they have notified the opposing party of the filing of the revised motion and/or payment of the filing fee so as to trigger the 21-day time period for the filing of a response to the Motion. Failure to submit the required filing fee and proof will require the re-filing of the motion with appropriate filing fee.

Finally, if you have colleagues or acquaintances that would benefit from keeping up-to-date with Tribunal developments, simply have them send an e-mail message to Cindy Maurer at maurerc@michigan.gov with "SUBSCRIBE" in the subject line. To unsubscribe, simply reply to this e-mail with the word "UNSUBSCRIBE" in the subject line.

Exhibit D
SMK v Department of Treasury

Order

Michigan Supreme Court
Lansing, Michigan

March 27, 2013

146335 & (40)(41)

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano,
Justices

SMK, LLC,
Petitioner-Appellee,

v

SC: 146335
COA: 306639
Michigan Tax Tribunal No:
00-409504

DEPARTMENT OF TREASURY,
Respondent-Appellant.

_____/

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the October 30, 2012 judgment of the Court of Appeals is considered, and it is GRANTED. The parties shall address: (1) whether the running of the 35-day time period in MCL 205.22(1) for an aggrieved taxpayer to file an appeal in the Tax Tribunal from a final assessment is triggered when the respondent Department of Treasury complies with the notice provision of MCL 205.28(1)(a), or is there an additional notice requirement under MCL 205.8 when a taxpayer has filed a proper written request designating an official representative to receive copies of letters and notices; and (2) whether the tolling ruling adopted by the Tax Tribunal and the Court of Appeals is contrary to the finality language of MCL 205.22(4) and (5).

The motion to stay the precedential effect of the published Court of Appeals opinion, *SMK, LLC v Dep't of Treasury*, 298 Mich App 302 (2012), is GRANTED in part regarding the statutory tolling ruling, but DENIED in part regarding the respondent Department of Treasury's compliance with the mandate of MCL 205.8.

We further ORDER that this case be argued and submitted to the Court together with the case of *Fradco, Inc v Dep't of Treasury* (Docket No. 146333), at such future session of the Court as both cases are ready for submission.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

s0320

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 27, 2013

Corbin R. Davis
Clerk

Exhibit E
Court of Appeals Decision of SMK v Department of Treasury

S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

SMK, LLC, Petitioner-Appellee, v DEPARTMENT OF TREASURY, Respondent-Appellant.	FOR PUBLICATION October 30, 2012 9:10 a.m. No. 306639 Tax Tribunal LC No. 00-409504 Advance Sheets Version

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Respondent appeals as of right the Tax Tribunal's order canceling an assessment against petitioner. This appeal is being considered concurrently with *Fradco, Inc v Dep't of Treasury*, 298 Mich App 292; ___ NW2d ___ (2012), in which the same issue is presented for our consideration. The sole issue before us is whether the Tax Tribunal had the jurisdiction to hear petitioner's appeal of its tax assessment. We conclude that it did and affirm.

This Court's review of a Tax Tribunal decision not relating to property tax valuation or allocation must include, at a minimum, whether the decision was authorized by law and, in cases in which a hearing was required, whether the decision was supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. When the resolution of the matter involves statutory interpretation, review de novo is appropriate. *AERC of Mich, LLC v Grand Rapids*, 266 Mich App 717, 722; 702 NW2d 692 (2005). "The purpose of statutory interpretation is to discover and give effect to the Legislature's intentions, and unambiguous statutory language should be enforced as written." *Walgreen Co v Macomb Twp*, 280 Mich App 58, 62; 760 NW2d 594 (2008). "In interpreting a statute, this Court avoids a construction that would render any part of the statute surplusage or nugatory [and] the statute must be read as a whole [with] [i]ndividual words and phrases [being] read in the context of the entire legislative scheme." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012) (citations omitted).

In the instant case, an audit revealed that petitioner had understated its taxable sales. On the basis of the result of this audit, respondent confirmed that petitioner had understated its taxable sales and issued a final assessment against petitioner requiring it to pay unpaid sales taxes, penalties, and interest. Despite petitioner's request for respondent to send copies of all letters and notices to petitioner's representative, the final assessment was initially sent only to

petitioner, on or about June 18, 2010. Petitioner's representative did not receive the final assessment from respondent until July 23, 2010. Petitioner then filed its appeal in the Tax Tribunal on July 29, 2010. Rather than filing a response, respondent moved for summary disposition under MCR 2.116(C)(4), arguing that the Tax Tribunal did not have jurisdiction over the appeal because it had not been filed within 35 days of the final assessment. MCL 205.22(1).

The Tax Tribunal concluded that MCL 205.8 adds a parallel notice requirement whenever a taxpayer has filed a proper written request that copies of letters and notices be sent to a representative. The Tax Tribunal further concluded that because respondent did not initially send notice to the appointed representative of petitioner, the time for petitioner's appeal did not begin to run until petitioner's representative was notified. Thus, the Tax Tribunal determined that the appeal was timely and it had jurisdiction. After the Tax Tribunal concluded that the "source documents were well-maintained and adequate to allow the Tribunal to determine the proper sales tax due," the burden was shifted to respondent to show that the amount paid was incorrect. Because respondent failed to satisfy that burden, the Tax Tribunal cancelled the final assessment against petitioner. The correctness of the amount paid is not at issue before us at this time.

The issue before us today is when the 35-day period under MCL 205.22(1) begins to run if the taxpayer has previously filed a written request with the Department of Treasury to send copies of all letters and notices to the taxpayer's representative. This case presents an issue of first impression because this Court has not previously considered the effect of MCL 205.8 on MCL 205.22 in a published opinion.[1] Petitioner argues that the 35-day period begins to run only once a copy of the final assessment has been received by petitioner's representative. We agree.

Under MCL 205.22(1), a taxpayer "may appeal the contested portion of [an] assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order." If an appeal is not initiated during these time frames, the assessment, decision, or order "is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack." MCL 205.22(4). The assessment in this case was based on the failure to pay taxes that respondent believed petitioner owed under the General Sales Tax Act, MCL 205.51 *et seq*. When imposing taxes under that act, respondent is required by MCL 205.59(1) to follow the provisions of the revenue collection act, MCL 205.1 *et seq*. Because the sections at issue—MCL 205.8, 205.22, and 205.28—are part of that act, the plain language of MCL 205.59(1) indicates that respondent is required to follow all these sections

[1] Although respondent implies that *Altman Mgt Co v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued April 10, 2001 (Docket No. 216912), p 3, should be persuasive authority in determining the outcome of the instant case, the Tax Tribunal found in *Altman* that the petitioner had not filed a valid written request that copies of letters and notices be sent to an official representative. Thus, this Court did not consider whether respondent is required to give a copy of a final assessment to a taxpayer's official representative if a request is on file, and *Altman* cannot be considered persuasive nor binding. See *Grimm v Dep't of Treasury*, 291 Mich App 140, 149 n 4; 810 NW2d 65 (2010); MCR 7.215(C)(1).

unless the provisions of the revenue collection act and the General Sales Tax Act conflict, in which event the provisions of the General Sales Tax Act apply.

MCL 205.28(1) provides, in relevant part:

> The following conditions apply to all taxes administered under this act unless otherwise provided for in the specific tax statute:
>
> (a) Notice, if required, shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the department may be made in the same manner."

And MCL 205.8 provides:

> If a taxpayer files with the department a written request that copies of letters and notices regarding a dispute with that taxpayer be sent to the taxpayer's official representative, the department shall send the official representative, at the address designated by the taxpayer in the written request, a copy of each letter or notice sent to that taxpayer. A taxpayer shall not designate more than 1 official representative under this section for a single dispute.

The Tax Tribunal held that MCL 205.8 provided a "more specific requirement" and that respondent was required to send all "letters and notices regarding a dispute with a taxpayer" to petitioner's representative as long as petitioner had made a proper written request.

MCL 205.8 imposes an affirmative and mandatory duty on respondent to send "copies of letters and notices regarding a dispute" to taxpayers' official representatives. See *Granger v Naegele Advertising Cos, Inc*, 46 Mich App 509, 512; 208 NW2d 575 (1973) ("'Shall' is equivalent to the word 'must'."). However, MCL 205.8 is not the kind of other "specific tax statute" contemplated by MCL 205.28(1). By its plain terms, MCL 205.28(1) applies to "this act," of which MCL 205.8 is a part. The proper interpretation of the statute is that the reference in MCL 205.28(1) is to *other* discrete statutes that themselves impose a tax, such as the General Property Tax Act, MCL 211.1 *et seq*.; the Income Tax Act, MCL 206.1 *et seq*.; or the Use Tax Act, MCL 205.91 *et seq*. The Tax Tribunal's interpretation of the statute would expand this reference to the entire set of Michigan tax statutes, rather than any particular notice requirements specific to each individual tax statute. Notably, the General Sales Tax Act, under which the taxes here were allegedly owed, does not have its own notice requirements. Nevertheless, as noted, the Tax Tribunal correctly held that MCL 205.8 was applicable and binding, and MCL 205.28 must be interpreted in parallel with MCL 205.8 whenever a taxpayer files a valid written notice designating an official representative.

Respondent argues that the Legislature would have specifically referred to MCL 205.28 in MCL 205.8 if it had intended to elevate the level of notice required. Respondent's interpretation would require us to undermine the plain language of a statute on the basis of an impermissible guess at the Legislature's intent. Statutory interpretation requires an holistic approach. *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). A provision that may seem ambiguous in isolation often is clarified by the remainder of the statutory scheme. *Id.* It is a tenet of statutory interpretation that "[c]onflicting provisions of a statute must be read

together to produce an harmonious whole and to reconcile any inconsistencies wherever possible." *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999). In reading the provisions of MCL 205.8 and MCL 205.28(1) together, it is clear that these sections should be interpreted as imposing parallel notice requirements whenever a taxpayer has a valid written request on file for respondent to send copies to an official representative. This interpretation gives meaning to both statutory sections' plain language and produces "an harmonious whole." *World Book*, 459 Mich at 416. Thus, the 35-day period of MCL 205.22(1) does not begin to run until notice has been given under both MCL 205.8 and MCL 205.28(1).

Respondent finally argues that a final assessment is not a letter or notice, thus avoiding application of MCL 205.8 to these proceedings. "Notice" is defined as "[l]egal notification required by law or agreement, or imparted by operation of law as a result of some fact[.]" Black's Law Dictionary (9th ed). Respondent defines the final assessments as final bills for taxes due, but however respondent wishes to describe them, they nevertheless function as legal notifications to taxpayers that taxes are due. It was previously the practice of respondent to use the phrasing "notice of final assessment" when it issued assessments. *Livingstone v Dep't of Treasury*, 434 Mich 771, 826; 456 NW2d 684 (1990) (opinion by LEVIN, J.); *Stackpoole v Dep't of Treasury*, 194 Mich App 112, 114; 486 NW2d 322 (1992); *Dow Chem Co v Dep't of Treasury*, 185 Mich App 458, 461-462; 462 NW2d 765 (1990). Furthermore, the plain language of MCL 205.28 uses the word "notice" to refer to final assessments. Thus, a final assessment is a "notice" for the purposes of interpreting MCL 205.8, and that statute imposes a duty on respondent to send a copy of that notice to a petitioner's official representative.

We conclude that MCL 205.8 must be interpreted in tandem with MCL 205.28(1) as creating parallel notice requirements. If a taxpayer has filed a proper written notice that designates an official representative, then respondent must give notice to both the taxpayer and the taxpayer's representative before the 35-day period under MCL 205.22(1) begins to run. Because petitioner filed its appeal within 35 days after its representative received notice from respondent, the Tax Tribunal had jurisdiction to hear petitioner's appeal. Therefore, we affirm.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello
/s/ Michael J. Riordan

Michigan Department of Treasury
151 (Rev. 11-12)

Authorized Representative Declaration (Power of Attorney)

Issued under authority of Public Act 122 of 1941.

Complete this form to appoint someone to represent you to the State of Michigan on tax, benefit, and debt matters. Also complete this form if you wish to revoke or change your authorized representation. Read the instructions thoroughly in each section. This form allows the Department to share confidential information with your authorized representative.

PART 1: TAXPAYER INFORMATION

Enter the taxpayer's or debtor's name, address, telephone number and fax number, if applicable. Enter an account number for either the individual or business. Enter an additional business account number, if desired.

Taxpayer's Name and Address. If filing joint return, include spouse's name. *If taxpayer is deceased, see note below. (Required)	If a business, enter DBA, trade or assumed name	
	Daytime Telephone Number (Required)	Fax Number
	E-mail Address	
	FEIN, ME or TR Number	Additional FEIN, ME or TR Number
	Taxpayer's Social Security Number	Spouse's Social Security Number

PART 2: REPRESENTATIVE INFORMATION AND AUTHORIZATION DATES

Your authorized representative may be an organization, firm, or individual. **If your representative is not an individual you must designate a contact person.** You may authorize a second contact person from the same firm in the box provided. Specify an authorization start date and expiration date. If none is listed, authorization will begin on the date this document is signed and continue until you notify Treasury in writing that it is revoked.

Authorization Start Date (mm/dd/yyyy)	Authorization Expiration Date (mm/dd/yyyy)

Representative's Name and Address (Required)	Contact Name (Required)	Additional Contact Name
	Telephone Number (Required)	Telephone Number
	Fax Number	Fax Number
	E-mail Address	E-mail Address

PART 3: CHANGE IN AUTHORIZATION

To add this document to your existing authorizing documents on file with the Department, skip this section. To replace or revoke your previously submitted authorizing documents, please follow the instructions below.

☐ Check this box to **CHANGE AUTHORIZED REPRESENTATION**. This form replaces all earlier Authorized Representation Declarations.

☐ Check this box to **REVOKE PREVIOUS AUTHORIZATION**: I revoke all Authorized Representation Declarations, and will represent myself in all tax matters.

* If taxpayer is deceased, include claimant's *Claim For Refund Due A Deceased Taxpayer,* (MI-1310) with death certificate and/or a letter of authority for personal representative. Claimant's or personal representative's name and address are required. In Part 5, claimant or personal representative needs to sign on taxpayer's behalf.

PART 4: TYPE OF AUTHORIZATION (Check box A or B.) This form is not a written request requiring the Department to send copies of letters or notices regarding a dispute to your authorized representative (see MCL 205.8 of 1941 PA 122 and at R.205.1006(8) for further details).

IMPORTANT: After granting either Limited Authority (check box A) or Unlimited Authority (check box B), you must initial next to the appropriate box in the space provided, acknowledging the fact that you understand the authority you are granting.

To RESTRICT AUTHORIZATION: Check the Limited Authorization box (check box A) and check the appropriate numbered boxes below. To further limit authority, indicate the type of tax or debt, type of form, and tax period for which you are granting authority in the Specific Limits table below. To grant Unlimited Authorization, skip to the Unlimited Authorization section below, check box B, and initial. DO NOT check both box A and box B; that would invalidate your request.

A. ☐ **LIMITED AUTHORIZATION _____ Initial if Selected**

To further limit authority, check the appropriate boxes and utilize the Specific Limits table below to indicate the specifics of the limited authorization.

☐ 1. Receive, inspect and provide confidential information

☐ 2. Represent me and make oral or written presentation, of fact or argument

☐ 3. Sign returns

☐ 4. Enter into agreements

Specific Limits:

Tax, Debt Type or Fee (Income, Business Tax, Sales, Driver Responsibility Fee, etc.)	Form Type or Assessment Number (MI-1040, MI-1040CR, 165, etc.)	Year(s) or Period(s)

To grant UNLIMITED AUTHORIZATION: Check the box below to allow unlimited access to your account by your representative.

B. ☐ **UNLIMITED AUTHORIZATION _____ Initial if Selected**

Checking Box B, authorizes my representative to do all of the following: (1) receive and inspect and provide confidential information, (2) represent me and make oral or written presentations of fact and/or argument, (3) sign returns, and (4) enter into agreements. **This authorization applies to all tax, benefit, and debt matters, all form types or assessment numbers, and for all years or periods.**

PART 5: TAXPAYER SIGNATURE

By signing this form, I am appointing my authorized representative to perform the specific functions listed above on my behalf with the State of Michigan.

Signature (Required)	Print Name and Title (Required)	Date (Required)
Spouse's Signature	Print Name and Title	Date

If you are an individual taxpayer (not representing a business), mail or fax this form to:
Michigan Department of Treasury
Customer Contact Center, Individual Correspondence Section
P.O. Box 30058
Lansing, MI 48909
Fax: (517) 636-4488

If the Treasury Collection Division or Michigan Accounts Receivable Collection System (MARCS) has requested you to file this form, mail or fax the form and any attachments to:
MARCS
P.O. Box 30158
Lansing, MI 48909-7658
Fax: (517) 272-5562

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Exhibit F
Revenue Administrative Bulletin 2008-8

72 (Rev. 4-06)

STATE OF MICHIGAN
DEPARTMENT OF TREASURY
LANSING

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REVENUE ADMINISTRATIVE BULLETIN 2008-8

Approved: December 2, 2008

REVENUE ACT - AUDITS AND THE SUSPENSION OF THE STATUTE OF LIMITATIONS

Pursuant to MCL 205.6a, a taxpayer may rely on a Revenue Administrative Bulletin issued by the Department of Treasury after September 30, 2006, and shall not be penalized for that reliance until the bulletin is revoked in writing. However, reliance by the taxpayer is limited to issues addressed in the bulletin for tax periods up to the effective date of an amendment to the law upon which the bulletin is based or for tax periods up to the date of a final order of a court of competent jurisdiction for which all rights of appeal have been exhausted or have expired that overrules or modifies the law upon which the bulletin is based.

RAB 2008-8 This Revenue Administrative Bulletin explains the period for which an audit conducted by the Michigan Department of Treasury suspends the running of the statute of limitations pursuant to the Revenue Act[1], MCL 205.27a(3)(a).

ISSUES

1. The Revenue Act provides at MCL 205.27a(3)(a) a suspension of the running of the statute of limitations for "the period pending the final determination of tax, including an audit . . . ." Accordingly, what is the period of an audit for purposes of establishing when the statute of limitations is suspended?

2. Will the Department discontinue the use of written "waivers" to suspend the statute of limitations?

3. When is this bulletin effective?

CONCLUSIONS

1. An audit begins on the AUDIT COMMENCEMENT DATE specified in the "Audit Confirmation Letter" and is completed on the date of the "FINAL AUDIT DETERMINATION LETTER." Assuming that the taxpayer does not seek review via an informal conference, appeal to the Michigan Tax Tribunal or Michigan Court of Claims, the statute of limitations will expire at the conclusion of one year after the date of the "FINAL AUDIT DETERMINATION LETTER" plus any remaining balance from the four year limitation period that was suspended by audit.

[1] 1941 PA 122, MCL 205.1 et seq

2. The Department will discontinue the routine use of written waivers of the statute of limitations, including their use in audit situations, consistent with the effective date of this bulletin.

3. This bulletin is effective for Audit Confirmation Letters with a commencement date on or after January 1, 2009.

LAW AND ANALYSIS

The Revenue Act provides the Department with a four year general statute of limitations period in which to assess a taxpayer. Further, a taxpayer has four years from the filing date of an original return to request a refund. The act provides in part:

> A deficiency, interest, or penalty shall not be assessed after the expiration of 4 years after the date set for the filing of the required return or after the date the return was filed, whichever is later. The taxpayer shall not claim a refund of any amount paid to the department after the expiration of 4 years after the date set for the filing of the original return.[2]

This four year statute of limitations period however may be suspended or tolled. Subsection (3)(a) of section 27a of the Revenue Act reads:

> The running of the statute of limitations is suspended for the following: (a) the period pending a final determination of tax, including audit, conference, hearing, and litigation of liability for federal income tax or a tax administered by the department and for 1 year after that period.[3]

The running of the statute of limitations is only suspended for those items that were the subject of the audit.[4]

If during the course of an audit it is determined that a taxpayer has a refund opportunity, the Department will provide notice to the taxpayer of the refund opportunity believed available. The auditor, however, is not required to calculate the amount of the refund or perform a review beyond that necessary to carry out the intended scope of the audit.[5]

Many "refunds" are contained within audit adjustments offsetting credits. Sometimes these credits fully offset taxes due resulting in an overall credit audit finding. These "refund" amounts will be incorporated into the Final Audit Determination expressed in a letter provided to the taxpayer, which will also provide information concerning the taxpayer's appeal rights. The statute of limitations for these credits is tolled pending the final determination of tax as a result of audit or appeal.

[2] MCL 205.27a(2)
[3] MCL 205.27a(3)(a)
[4] MCL 205.27a(4)
[5] MCL 205.6

While the statute of limitations for claiming a refund is tolled pending the final determination of tax as a result of audit or appeal, only those refunds that are determined to be owed to the taxpayer as a result of audit adjustments, or that are otherwise contained within the subject of the audit will be suspended. The statute of limitations for claiming a refund for any item that is not the subject of the audit continues to run for any refund amount claimed by the taxpayer that was not determined as a result of an audit. The Department must receive timely written notice of any claim for refund.

Historically, the Department has sought waivers to suspend the running of the statute of limitations when auditing taxpayers. The waivers contained the date upon which they expired.[6]

Because the running of the statute of limitations is suspended during an audit by statute, a waiver is not required to toll the statute of limitations. Accordingly, the Department will no longer routinely seek waivers, but will instead rely on the statutory authority that suspends the running of the statute of limitations for the period of an audit.[7]

To delineate the period of an audit, it is necessary to identify when an audit begins and ends. To provide consistency in application and notice, an audit will be deemed to commence on the AUDIT COMMENCEMENT DATE specified in the "Audit Confirmation Letter" that the Department will provide to taxpayers. The "Audit Confirmation Letter" will contain a paragraph titled "Suspension of the Running of the Statute of Limitations" that will contain a statement similar to the following that will identify the AUDIT COMMENCEMENT DATE:[8]

> Suspension of the Running of the Statute of Limitations
>
> The running of the Statute of Limitations will be suspended for the duration of the audit, beginning on the AUDIT COMMENCEMENT DATE of **July 1, 2007** and will be reinstated on the date that the FINAL AUDIT DETERMINATION LETTER is issued. Reference MCL 205.27a(3) and (4) and Revenue Administrative Bulletin 2008-8

Further, the Audit Confirmation Letter will inform the taxpayer of the subject of the audit and include the names and telephone numbers of the Area Manager, Team Manager and Auditor so that any concerns or questions a taxpayer may have can be addressed with the Department.[9]

An audit will be deemed completed on the date of the "FINAL AUDIT DETERMINATION LETTER" that will be provided to the taxpayer. This letter will contain a statement similar to the following that will notify the taxpayer that the statute of limitations has been reinstated:

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[6] MCL 205.27a(3)(b)
[7] MCL 205.27a(3)(a)
[8] The dates referenced in the sample Audit Confirmation Letter and Final Audit Determination Letter statements are for demonstration purposes only.
[9] The Final Audit Determination Letter will also include the names and phone numbers of the Area Manager, Team Manager and Auditor.

Reinstatement of the Running of the Statute of Limitations

This FINAL AUDIT DETERMINATION LETTER reinstates the running of the Statute of Limitations that was suspended on **July 1, 2007**, the AUDIT COMMENCEMENT DATE. Reinstatement of the running of the Statute of Limitations is **May 1, 2008.** The statute of limitation will expire at the conclusion of one year after **May 1, 2008** plus any remaining balance from the four year limitation period that was suspended by the audit. Reference MCL 205.27a(3) and (4) and Revenue Administrative Bulletin 2008-8

If a final determination is not appealed by the taxpayer, the running of the statute of limitations will expire one year after the date of the "FINAL AUDIT DETERMINATION LETTER," as prescribed by subsection 3(a), plus any days remaining from the four year statute of limitations period that were tolled or suspended during audit.

A timely appeal of the audit determination will extend **expiration** of the statute of limitations to one year from the final resolution of the appeal, plus any days remaining from the four year statute of limitations period that were suspended upon commencement of the audit and remained suspended until the appeal process was concluded.

In summary, the statute of limitations will be applied as follows:

1. In those instances where the audit is conducted prior to the date the four year statute of limitations otherwise would have run, the statute of limitations will be extended to a date one year after the conclusion of the audit, plus any days remaining from the four year statute of limitations period that had not run prior to the AUDIT COMMENCEMENT DATE.

2. In those instances where the audit is conducted prior to the date the four year statute of limitations otherwise would have run, and the audit determination is appealed, the statute of limitations will be extended to a date one year after the conclusion of the appeal, plus any days remaining from the four year statute of limitations period that had not run prior to the AUDIT COMMENCEMENT DATE and remained suspended during the appeal period. The running of the four year general statute of limitations recommences when the audit determination that was appealed has been finalized.

EXAMPLES

Example 1:
Company XYZ files its calendar year 2008 Michigan Business Tax (MBT) return on April 30, 2009. The general four year statute of limitations runs April 30, 2013. An MBT audit of XYZ for the period January 1, 2008 through December 31, 2008 is commenced by the Department on November 15, 2012, the AUDIT COMMENCEMENT DATE specified in the Audit Confirmation Letter issued to the company. The audit was commenced with 166 days remaining before the general statute of limitations has run. The Department completes the audit and issues XYZ a FINAL AUDIT DETERMINATION LETTER on May 15, 2013. The running of the statute of limitations is suspended as of November 15, 2012, and recommences on May 15, 2013, when the audit is concluded. The running of the statute of limitations expires on October 28, 2014, one year and 166

days from the end of the audit. The audit prevents the general statute of limitations from expiring as it normally would, four years after the date set for the filing of the MBT annual return, which was April 30, 2013.

Example 2:
Same example as one above but XYZ timely appeals the Final Audit Determination on May 30, 2013. The appealed assessment is finalized May 15, 2015. The running of the statute of limitations expires on October 28, 2016, one year and 166 days from the date the appealed assessment was finalized.

Example 3:
The Department conducts a 2007 SBT and 2008 MBT audit of company XYZ for the period January 1, 2007 through December 31, 2008. Company XYZ files its 2007 SBT return on December 26, 2008 under a timely extension. The company timely files its 2008 MBT return on April 30, 2009. The Department begins the audit by issuing XYZ an Audit Confirmation Letter with an AUDIT COMMENCEMENT DATE of November 15, 2012. The commencement of the audit "suspends" the running of the general four year statute of limitations. The AUDIT COMMENCEMENT DATE was 41 days before the running of the four year statute of limitations for year 2007 that would have expired on December 26, 2012, and 166 days before the running of the four year statute of limitations for year 2008 that would have expired on April 30, 2013. The Department completes the audit and issues XYZ a FINAL AUDIT DETERMINATION LETTER on May 15, 2014. The running of the statute recommences May 15, 2014 for both tax years when the audit is concluded. The running of the statute of limitations for the 2007 tax year expires on June 25, 2015 one year and 41 days from the end of the audit. The statute of limitations for the 2008 tax year expires on October 28, 2015 one year and 166 days from the end of the audit.

Example 4:
Company XYZ files its 2007 calendar year SBT return on April 30, 2008. The four year statute of limitations runs on April 30, 2012. An SBT audit of XYZ for the period January 1, 2007 through December 31, 2007 begins on November 15, 2011, the AUDIT COMMENCEMENT DATE specified in the Audit Confirmation Letter. The Audit Confirmation Letter specifies that the Small Business Credit claimed on the 2007 SBT return is the subject of the audit. The audit was commenced with 167 days remaining before the statute of limitations has run (Note: the number of days in this example differs from those in the previous example due to 2012 being a leap year). The Department completes the audit and issues XYZ a FINAL AUDIT DETERMINATION LETTER on May 15, 2012 disallowing the entire Small Business Credit claimed in the amount of $12,000. The taxpayer appeals the audit determination on May 30, 2012. In the petition, the taxpayer alleges that they are entitled to the $12,000 Small Business Credit as originally claimed on their SBT return. In addition, the taxpayer also alleges they are entitled to a refund claim of $5,000 resulting from subtraction of royalty income that was erroneously omitted from their 2007 SBT return. The royalty income subtraction that is the basis for the $5,000 refund claim was not within the subject of the audit.

The statute of limitations for the additional $5,000.00 refund expired on April 30, 2012 four years from the due date of the original return. The audit and subsequent appeal do not toll this refund claim as the subject of the audit did not cover this claim.