

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
[Meter, P J , and O'Connell and Davis, JJ.]

FORD MOTOR COMPANY

Supreme Court Nos. 133400-06

Petitioner-Appellee,

Court of Appeals No. 262487

v

Wayne Circuit Court

STATE TAX COMMISSION,

LC Nos. 04-430612-AA

04-430613-AA

04-430614-AA

Respondent-Appellant,

and

DEPARTMENT OF ENVIRONMENTAL
QUALITY

Respondent-Appellant,

and

CITY OF DEARBORN,

Intervening Respondent-Appellant.

**APPELLANTS MICHIGAN
DEPARTMENT OF
ENVIRONMENTAL QUALITY
AND MICHIGAN STATE TAX
COMMISSION'S REPLY TO
FORD MOTOR COMPANY'S
BRIEF**

FORD MOTOR COMPANY,

Court of Appeals No. 262488

Petitioner-Appellee,

Wayne Circuit Court

v

LC Nos. 04-430612-AA

04-430613-AA

STATE TAX COMMISSION,

04-430614-AA

Respondent-Appellant,

and

DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Respondent-Appellant,

and

CITY OF DEARBORN,

Intervening Respondent-Appellee.

February 1, 2008

FORD MOTOR COMPANY,

Petitioner-Appellee,

v

STATE TAX COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Respondents-Appellants,
and

CITY OF DEARBORN,

Intervening Respondent-Appellant.

Court of Appeals No. 262500

Wayne Circuit Court

LC Nos. 04-430612-AA

04-430613-AA

04-430614-AA

DETROIT DIESEL CORPORATION,

Petitioner-Appellee and
Cross-Appellant,

v

STATE TAX COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Respondents-Appellants and
Cross-Appellees,
and

CHARTER TOWNSHIP OF REDFORD,

Intervening Respondent.

Court of Appeals No. 263188

Wayne Circuit Court

LC No. 04-430915-AA

FORD MOTOR COMPANY,

Petitioner-Appellee,

v

STATE TAX COMMISSION AND
DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Respondents-Appellants.

Court of Appeals No. 264154

Wayne Circuit Court

LC No. 05-507760-AA

DAIMLERCHRYSLER CORP,
Petitioner-Appellee and
Cross-Appellant,

v

STATE TAX COMMISSION,
DEPARTMENT OF ENVIRONMENTAL
QUALITY AND TOWNSHIP OF
SYLVAN,

Respondents-Appellants and
Cross-Appellees

Court of Appeals No. 265686
Washtenaw Circuit Court
LC No. 2005-000250-AA

DAIMLERCHRYSLER CORP,
Petitioner-Appellee and
Cross-Appellant,

v

STATE TAX COMMISSION,
DEPARTMENT OF ENVIRONMENTAL
QUALITY AND CITY OF AUBURN
HILLS,

Respondents-Appellants and
Cross-Appellees

Court of Appeals No. 267565
Oakland Circuit Court
LC No. 05-064732-AA

**APPELLANTS MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY AND
MICHIGAN STATE TAX COMMISSION'S REPLY TO FORD MOTOR COMPANY'S
BRIEF**

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

John Fordell Leone (P38938)
Assistant Attorney General
Attorneys for Dept of Environmental Quality
Respondent-Appellant and Cross-Appellee
Environment, Nat'l Resources & Agric Division
P.O. Box 30755
Lansing, MI 48909
517/373-7540

Ross H. Bishop (P25973)
Assistant Attorney General
Attorney for Michigan State Tax Commission
Respondent-Appellant and Cross-Appellee
Revenue and Collections Division
P.O. Box 30754
Lansing, MI 48909
517/373-3203

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ARGUMENT

Pursuant to MCR 7.306(C), Appellants Michigan Department of Environmental Quality (DEQ) and the Michigan State Tax Commission submit the following rebuttal to arguments contained in the brief filed by Appellee Ford Motor Company (Ford):

- I. **The DEQ/Tax Commission's argument that the §5901 phrase "within this state" modifies the entire preceding phrase "to the public health or to property" is not a "new issue" but is simply an additional statutory interpretation argument that is not prohibited by the "preservation of issues" principle.**

Ford argues that this Court should disregard, as untimely, the DEQ/Tax Commission's argument that the Legislature intended §5901 to restrict the Part 59 tax exemption to equipment controlling air pollution "within this state" of Michigan.¹

Ford misapplies the "preservation of issues" principle to what is simply an additional argument, which proposes no new facts, regarding what has always been the sole issue in this matter: the proper interpretation of Part 59. The Court of Appeals has addressed this situation²:

Defendant correctly observes that plaintiff did not make this argument in the trial court and that the trial court did not decide the issue. However, this Court may disregard the preservation requirement for issues of law where all necessary facts have been presented.

The sole issue in this matter — interpretation of Part 59 — is strictly a matter of law; and all necessary facts have been presented.³ Also, the DEQ/Tax Commission's "within this state" argument was emphasized in the Joint Application for Leave to Appeal to this Court,⁴ and Ford did not object in its brief in opposition. See, *Ford's Brief in Opposition to Applications for Leave to Appeal*.

¹ Ford Brief, pp 3, 8, 9, 19, and 28-32.

² *Detroit Leasing Co. v City of Detroit*, 269 Mich App 233, 237-238, 713 NW2d 269 (2005).

³ Ford has improperly submitted additional documents proffering unnecessary and irrelevant factual claims that should be disregarded. See, Section IV of this brief.

⁴ Joint Application for Leave to Appeal, pp 15-16 and 20.

II. Long-standing precedent for strictly construing tax exemption statutes should not be replaced with a standardless "fair and reasonable interpretation" concept or be otherwise diluted by the *Wexford*⁵ case.

Ford states that "Part 59 does not clearly and unambiguously limit [the tax] exemption to equipment that controls pollution primarily of Michigan's air" and that "it is not clear that the public health to be protected is only of Michigan residents."⁶ Ford argues in conclusion that "[a] fair and reasonable interpretation of the statute is that equipment qualifies [for the tax exemption] if its primary purpose is to control pollution that would be harmful to the public *anywhere* or to property within this state."⁷ This virtually standardless "fair and reasonable interpretation" approach to interpreting tax exemption statute ambiguities, and the purported result of its application, turns upside down this Court's long-standing precedent, including *Michigan Baptist Homes & Development Co v Ann Arbor*⁸:

Exemption from taxation effects the unequal removal of the burden generally placed on all landowners to share in the support of local government. Since exemption is the antithesis of tax equality, exemption statutes are to be strictly construed in favor of the taxing unit[;]

*St. Joseph's Church v. Detroit*⁹:

A grant of exemption is never presumed; on the contrary, in all cases of doubt as to the legislative intention, or as to the inclusion of particular property within the terms of the statute, the presumption is in favor of the taxing power, and the burden is on the claimant to establish clearly his right to exemption[;]

and *Evanston Y.M.C.A. Camp v. State Tax Com*¹⁰:

We made this clear in *City of Detroit v Detroit Commercial College*, 322 Mich 142 [1948], when we quoted 2 Cooley on Taxation (4th ed), § 672, pp. 1404-

⁵ *Wexford Medical Group v Cadillac*, 474 Mich 192; 713 NW2d 734 (2006).

⁶ Ford Brief, p 29.

⁷ Ford Brief, p 29 (Emphasis added). See also, discussion regarding the "last antecedent" rule. DEQ/Tax Commission Reply to DaimlerChrysler/Detroit Diesel Brief, pp 2-3.

⁸ *Michigan Baptist Homes & Development Co v Ann Arbor*, 396 Mich 660, 669-670; 242 NW2d 749 (1976). (Emphasis added).

⁹ *St. Joseph's Church v. Detroit*, 189 Mich 408, 414 (1915).

¹⁰ *Evanston Y.M.C.A. Camp v. State Tax Com.*, 369 Mich 1, 8 (1962).

1408, as follows (p 149):

"Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt. In other words, since taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms; it cannot be taken to have been intended when the language of the statute on which it depends is doubtful or uncertain; and the burden of establishing it is upon him who claims it. Moreover, if an exemption is found to exist, it must not be enlarged by construction, since the reasonable presumption is that the State has granted in express terms all it intended to grant at all, and that unless the privilege is limited to the very terms of the statute the favor would be extended beyond what was meant."

Under these canons, this Court has established that it is fair and reasonable to strictly construe tax exemption statute ambiguities because the burden of paying taxes should be equally shared, and therefore a tax exemption "cannot be made out by inference or implication"; "ought to be expressed in clear and unambiguous terms"; and should not be allowed if the subject statute language "is doubtful or uncertain."¹¹ This Court should reject Ford's argument that long-standing precedent to strictly construe tax exemption statute ambiguities should be replaced with a virtually standardless "fair and reasonable interpretation" concept that abandons the protections of accomplishing a fair and reasonable sharing of the common burden of taxation.

Likewise promoting its "fair and reasonable interpretation" approach to tax exemption statutes, Ford argues that *Wexford Medical Group v Cadillac*¹² and other "post-*Wexford*" cases stand for the proposition that the long-standing precedent from *Michigan Baptist Homes*, (to strictly construe tax exemption statutes) has somehow been diluted.¹³ However, *Wexford* itself states¹⁴:

¹¹ *Evanston v Y.M.C.A. Camp v State Tax Comm*, 369 Mich at 8 (quoting 2 *Cooley on Taxation* (4th Ed.), p. 1403, § 672).

¹² *Wexford Medical Group, v Cadillac*, 474 Mich 192 (2006).

¹³ Ford Brief, pp 13, 21.

¹⁴ *Wexford Medical Group v Cadillac*, 474 Mich at 204.

In examining this issue, we bear in mind the time-honored rules of statutory construction, under which our paramount concern is identifying and effecting the Legislature's intent. *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich. 661, 665; 378 N.W.2d 737 (1985). And where a tax exemption is sought, we recall that because tax exemptions upset the desirable balance achieved by equal taxation, they must be narrowly construed. *Id.*; see also *Michigan Baptist Homes & Dev Co v City of Ann Arbor*, 396 Mich. 660, 669-670; 242 N.W.2d 749 (1976).

This Court should reject Ford's attempt with the *Wexford* cases to conflate the generally applicable principle that a non-existent statutory requirement should not be read into a statute with the uniquely-purposed canon that tax exemption statute ambiguities should be strictly construed in favor of the taxing unit.

III. This Court should reject Ford's argument that as a matter of statutory construction it "is no longer good law" to read statutes "as a whole."

Ford implicates the "preservation of issues" principle, stating that under its perception of "a fair reading of the proceedings below," the DEQ/Tax Commission did not raise the issue of reviewing statutes "as a whole." However, the DEQ specifically stated in its brief to the Court of Appeals¹⁵:

Noteworthy on this point, the language of MCL 324.5[9]01 clarifies that only an incinerator "with a pollution abatement device in effective operation" and only the "fuel burner portion" of a system modified for air pollution control are a "facility" eligible for tax exemption. These very strict limitations speak loudly of the very limited types of equipment intended by the statute to be exempt from tax.

Ford then argues that the DEQ/Tax Commission relies upon the *Metropolitan Council* case¹⁶ to support an "absurd results" doctrine argument, and that the case "is no longer good law, in view of this Court's recent practice of strict textualism."¹⁷ In support of this argument, Ford

¹⁵ DEQ's Court of Appeals Brief in Nos. 262487, 262488, and 262500 (Nov. 21, 2005), p 20.

¹⁶ *Metropolitan Council 23, etc. v Oakland County*, 409 Mich 299, 318-319, 294 NW2d 578 (1980).

¹⁷ Ford Brief, p 33.

cites *People v Javens*¹⁸ and implicitly attributes to this entire Court a quotation from the concurring opinion of just one Justice (not joined by any other Justice) that disapproves of the "absurd results" doctrine.¹⁹ However, the DEQ/Tax Commission never offered *Metropolitan Council* in support of the "absurd results" doctrine. Moreover, the DEQ/Tax Commission does not argue or rely on the "absurd results" doctrine. *Metropolitan Council* is relied upon by the DEQ/Tax Commission²⁰ to demonstrate the canons of statutory construction affirming that a statute should be read "as a whole" when determining what is "plain and unambiguous" and that a disputed statutory provision "must be read in light of the general purpose of the act and in conjunction with the pertinent provisions thereof."²¹

IV. This Court should reject Ford's argument that "[p]rotection of other states' air results in, and is synonymous with, protection of Michigan's air" and reject Ford's improper submission of 114 pages from outside the record proffering factual claims of the "mobile" nature of air pollution

Ford states that the DEQ/Tax Commission's "within this state" argument "ignores that air pollution is mobile."²² In support of its strained conclusion that "[p]rotection of other states' air results in, and is synonymous with, protection of Michigan's air,"²³ Ford improperly cites and includes in its Appendix the following documents²⁴ that are not part of the record below:

- NOx – EPA Website information (Ford Appendix, pp 74b-80b);
- *Air Pollution Transport and How It Affects New Hampshire* (Ford Appendix, pp 81b-132b);
- NOx SIP Call, 63 Fed Reg 57356 (October 27, 1998) (Not included in Ford Appendix);
- NOx SIP Call Fact Sheet (Ford Appendix, pp 133b-146b);
- EPA Letter – Western Michigan Pollution (Ford Appendix, pp 147b-150b);

¹⁸ *People v Javens*, 469 Mich 1032, 677 NW2d 329 (2004).

¹⁹ *People v Javens*, 469 Mich at 1033.

²⁰ DEQ/Tax Commission Brief, p 21.

²¹ *Metropolitan Council*, 409 Mich at 318.

²² Ford Brief, p 30.

²³ Ford Brief, p 32.

²⁴ Ford Brief, pp 30-32.

- Wisconsin DNR Newsletter (Ford Appendix, pp 1151-159b);
- The Chemistry of Atmospheric Pollutants (Ford Appendix, pp 160b-167b);
- *Nitrogen Oxides, Regional Transport, and Ozone Air Quality. Results of a Regional-Scale Model for the Midwestern United States* (Ford Appendix, pp 168b-183b); and
- Press Release by Waterkeepers Alliance: *DTE Energy Company accused of environmental offences in Canada* (Ford Appendix, pp 184b-186b).

Rather than rely on the document addressing the regional transport of air pollution that is part of the record²⁵ (included as part of Ford's tax exemption applications) or first file a motion in this Court for an addition to the record, Ford instead simply ignored proper procedure and submitted these documents without offering a justification. The improperly cited and submitted documents should not be considered by this Court. To the extent that the factual claims in the documents are considered, they are irrelevant because whatever may now be understood about the mobile nature of air pollution plays no role in interpreting §5901 or Part 59 generally.

The subject §5901 "within this state" language was originally enacted by the Michigan Legislature in 1965,²⁶ decades before any of the improperly submitted information regarding the mobility of air pollution was available. The foremost rule of statutory construction is to discern and give effect to the intent of the Legislature.²⁷ Only unbridled speculation could allow one to conclude the Michigan Legislature in 1965 considered the mobile nature of air pollution and intended the text of the Part 59 tax exemption for equipment that primarily controlled air pollution "within this state" to mean "within this state *or within other states* ". Nonetheless, this is apparently precisely what Ford argues. If Ford is arguing for expansion of the Part 59 tax exemption based on new information regarding the mobility of air pollution, this argument should also fail. The present matter is not a public policy question of whether Part 59 should now be amended by the Legislature. Instead it is a strictly legal question of how the statute

²⁵ EPA: *The Regional Transport of Ozone* (DEQ/Tax Commission Appendix, pp 40a-43a).

²⁶ 1965 PA 250, C.L.1948 §336.1 *et seq.*

²⁷ *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

language reads and what the Michigan Legislature intended in 1965. The documents improperly submitted by Ford, even if not stricken, play no role in interpreting Part 59, and are irrelevant. The Michigan Legislature chose not to say in §5901 "to the public health *anywhere* or to property within this state." The plain text of the statute demonstrates that the Legislature intended to protect the public health in *Michigan* by limiting the tax exemption to equipment that controlled air pollution in Michigan.

V. This Court should reject Ford's public policy arguments and DEQ Guideline arguments for expanding the application of Part 59

Ford argues that its "test cells" satisfy Part 59 because the test cells "have resulted in less, not more pollution";²⁸ "the amount and detriment of any emissions from the test cells pale in comparison to the enormous benefit and amount of reduced pollution as a result of testing at the test cells;"²⁹ and "[m]obile sources of pollution [read: vehicles] are as or more significant a menace than stationary sources of pollution."³⁰ These public policy arguments (that cite "acid rain" and "'global warming' which adversely affects the entire world"³¹) run far afield from the plain text of Part 59.

The Part 59 tax exemption is only for equipment that is both "installed or acquired for the primary purpose of controlling or disposing of air pollution"³² and "designed and operated primarily for the control, capture and removal of pollutants from the air."³³ The words "primary" and "primarily" are not defined in Part 59. Webster's dictionary defines the word "primary" as 1)"first in time or order of development [, 2)] from which others are derived [, 3)] of or in the

²⁸ Ford Brief, p 15.

²⁹ Ford Brief, p 16.

³⁰ Ford Brief, pp 27-28.

³¹ Ford Brief, p 30, fn 17.

³² MCL 324.5901.

³³ MCL 324.5903.

first stage of a sequence."³⁴ Webster's dictionary defines the word "primarily" as "1[]) at first; originally[,] 2[]) mainly; principally[.]"³⁵ Under these definitions, *testing* is the primary purpose for which the test cells were installed (and not the derivative final stage purpose of air pollution control). Likewise, the test cells operate primarily for *testing* as their first, original, main and principal function. Despite Ford's arguments to the contrary,³⁶ Part 59 was not intended to grant a tax exemption for equipment that does not itself function to physically control air pollution, but rather contributes to a sequence of events that at the final stage derives the result of controlling air pollution.

Ford also argues that its "test cells" are entitled to a Part 59 tax exemption under the DEQ Guidelines because they are "integral and necessary to the effectiveness of the operation of the catalytic converter, carbon canister and other control equipment incorporated in [Ford's] motor vehicles and engines."³⁷ Ford ultimately argues that "DEQ was in fact bound by its Guidelines to approve exemption of the test cells."³⁸ However the Guidelines do not support granting a Part 59 tax exemption to Ford, are not promulgated rules, are non-binding, and cannot create a tax exemption that does not exist under the language of Part 59.³⁹ The Guidelines express the DEQ's approach to allowing the tax exemption for "ancillary equipment" that monitors or otherwise assists in the *ongoing operation* of equipment that *physically* prevents the release of air pollution. Ford's own admissions that the test cells do not assist with the ongoing operation of equipment that physically captures air pollution demonstrates that test cells do not satisfy a fair reading of the Guideline's "ancillary equipment" requirements.

³⁴ See, *Webster's New World Dictionary, Third College Edition* (1988).

³⁵ See, *Webster's New World Dictionary, Third College Edition* (1988).

³⁶ Ford Brief, generally, and pp 15, 32.

³⁷ Ford Brief, p 24.

³⁸ Ford Brief, p 36 (Bolding omitted).

³⁹ See, DEQ/Tax Commission Brief, pp 25-26.

VI. The *Meijer*⁴⁰ Court clearly described the baler and compactor equipment as part of a larger "facility" with a primary purpose of pollution control, and ruled that each piece of equipment contributing to such a "facility" need not physically control air pollution

Ford argues that "[t]here was no indication in *Meijer* the baler and compactor were part of a larger facility, certainly not a larger facility that itself physically captured, controlled or disposed of pollution."⁴¹ To the contrary, the *Meijer* Court clearly described the scenario⁴²:

After several attempts to eliminate the emissions proved unavailing, [Meijer] conducted a study and found it could recycle 75 percent of the refuse by using compacters and balers, disposing of the remainder through landfill operations.

* * *

As a result of [the] study [Meijer] decided that the less expensive method of waste disposal via incineration would be replaced with recycling and landfill operations. . . . This method of waste disposal was found to have *completely eliminated the air pollution problem*.

The *Meijer* Court also clarified that, to qualify for the tax exemption, each contributing piece of equipment need not itself physically capture pollution *but only if the contributing piece of equipment was part of a larger facility designed and operated primarily to control air pollution*⁴³:

The act provides that the *facility* must be designed and operated primarily for pollution control. It does not state that the individual units or equipment which make up a facility must possess such a feature.

Accordingly, just as the compactor and baler equipment in *Meijer* qualified for Part 59 tax exemption because they were a contributing part of the larger recycling and landfiling operations conducted for the primary purpose of physically controlling air pollution, equipment that does not itself physically control pollution may qualify for Part 59 tax exemption, *but only if it is a contributing part of a larger facility operated primarily to physically control air pollution*.

⁴⁰ *Meijer, Inc. v State Tax Comm*, 66 Mich App 280; 238 NW2d 582 (1975).

⁴¹ Ford Brief, p 17.

⁴² *Meijer, Inc.* 66 Mich App at 282, 283-284 (Emphasis added).

⁴³ *Meijer, Inc.* 66 Mich App at 285 (Emphasis original).

Ford's test cells are not part of a larger facility operating primarily to physically control air pollution, but rather are part of a larger testing facility operating primarily to test the working efficiency of air pollution control equipment that will be in active operation later, without any monitoring or testing assistance from the test cells.

CONCLUSION AND RELIEF SOUGHT

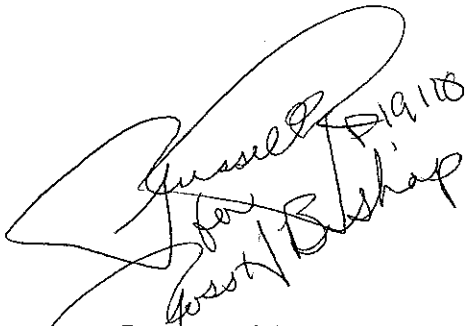
Ford's arguments urging this Court to stray from long-standing canons of statutory construction should be rejected. Canons for interpreting tax exemption statutes protect tax equality and avoid unfair sharing of our common tax burden.

This Court should uphold the DEQ findings that the subject test cells do not qualify for Part 59 tax exemption and uphold the resulting tax exemption denials by the Tax Commission, and reverse the Court of Appeals.

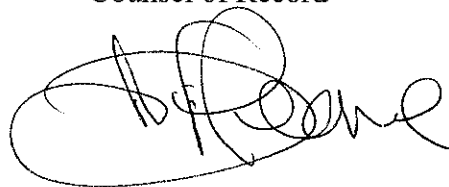
Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record



Ross H. Bishop (P25973)
Assistant Attorney General
Attorney for Michigan State
Tax Commission
Respondents-Appellant and
Cross-Appellee
Revenue and Collections Division
P.O. Box 30754
Lansing, MI 48909
517/373-3203



John Fordell Leone (P38938)
Assistant Attorney General
Attorneys for Respondent-Appellant
Environment, Natural Resources,
and Agriculture Division
P.O. Box 30755
Lansing, MI 48909
517/373-7540

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