IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
JUDGES: MARK J. CAVANAUGH, KATHLEEN JANSEN AND HILDA GAGE

FLUOR ENTERPRISES, INC.

Plaintiff/Appellee/Cross-Appellant,

v

REVENUE DIVISION, DEPARTMENT
OF TREASURY, STATE OF MICHIGAN,

Defendant/Appellant/Cross-Appellee.
_____/

Supreme Court Case No. 129149

Court of Appeals Case No. 251005

Court of Claims Case No. 02-27-MT

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FLUOR ENTERPRISES, INC. REPLY BRIEF

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I. INTRODUCTION

The issue in this case is the proper application of MCL 208.53(c) ("Section 53(c)"). Plaintiff/Appellee/Cross-Appellant, Fluor Enterprises, Inc. ("Fluor"), believes that under the plain language of Section 53(c), Fluor's receipts from services performed outside Michigan cannot be considered as Michigan receipts. Nevertheless, Defendant/Appellant/Cross-Appellee, the Michigan Department of Treasury (the "Department"), claims that Section 53(c) allows the Department to attribute to Michigan, as "Michigan sales," receipts Fluor derived from services performed outside Michigan.

Section 53(c) clearly only requires revenues from planning and design activities performed within Michigan to be included in the sales factor numerator as Michigan receipts. This is so because the statute refers to "services performed for planning, design or construction activities within this state." This is the interpretation by the Court of Claims below. The Department's position requires a tortured construction of Section 53(c) and would result in Section 53(c) being unconstitutional. The Department's tortured construction and its attempted reliance upon alleged "legislative history" show the weakness of the Department's position. Fluor respectfully requests that the Court reverse the Court of Appeals and embrace the interpretation of Section 53(c) adopted by the Court of Claims.

II. ARGUMENT

A. The Phrase "Within This State" Modifies The Phrase "Planning, Design, Or Construction."

The Department argues extensively that the phrase "within this state" modifies the word "activities" in Section 53(c). *See* Department's Appellee Brief at 2-4. Fluor agrees with this. The question, however, is whether the word "activities" relates to the phrase "planning, design, or construction." The Department admits that it does. On page 4 of its Cross-Appellee Brief, the

Department states that "[i]t is the economic impact of the "activities," be they planning, design or construction, that give rise to the 'value added,' which is the base of the single business tax."

Thus, in Section 53(c), the phrase "within this state" modifies the word "activities" and the word "activities" relates to the phrase "planning, design, or construction." Therefore, the phrase "within this state" modifies, albeit indirectly, the phrase "planning, design or construction." Therefore, Section 53(c) only attributes to Michigan receipts for planning, design, or construction activities if those activities occur "within this state."

Indeed, if the phrase "within this state" was not related to the phrase "planning, design, or construction," Section 53(c) would be nonsensical and unconstitutional because it would attribute to Michigan receipts derived from "planning" (wherever it occurred), "design" (wherever it occurred), and "construction activities" (if the construction activities occurred in Michigan). Likewise, any state that enacted legislation identical to Section 53(c) would attribute to that state all receipts derived from planning and design, regardless of where that planning and design took place. That result is clearly unconstitutional under the "internal consistency" test. *See* Fluor's Cross-Appellant Brief at 12-16 and Fluor's Appellee Brief at 5-8.

B. The Department's Position Tortures the Language of Section 53(c).

On page 5 of its Brief, the Department dis-assembles and rearranges the language of Section 53(c) to suit its liking. The Court, however, must be guided by the plain language of Section 53(c). That language reads as follows:

> Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

Thus, the language is clear that receipts derived from planning services performed within Michigan are sourced to Michigan. Likewise, receipts derived from design services performed

within Michigan are sourced to Michigan and receipts derived from construction services performed within Michigan are sourced to Michigan.

The Department, however, attempts to re-write the statute to read:

> Receipts derived from [services performed for] planning, design, or construction activities **for a construction project located** within this state shall be deemed Michigan receipts.

Section 53(c), however, does not so read. If the Legislature had wanted Section 53(c) to produce the result advocated by the Department, it could have easily written Section 53(c) to do so. The Legislature did not do so and it is not the province of the Department or the Court to re-write Section 53(c).

The Department also alleges it has held a "long-standing interpretation" of Section 53(c). *See* Department's Cross-Appellee Brief at 4. Presumably, the Department is asking the Court to defer to its interpretation. Such deference is not proper for at least three reasons. First, there is absolutely no evidence of any administrative interpretation of Section 53(c).[1] Rather, there is only the assertion of the Department's counsel in its Brief that this is the Department's interpretation. But the representations of a lawyer for an administrative agency do not rise to the level of an agency's construction of an act. *See Kelley v MPSC*, 412 Mich 385, 420; 316 NW2d 187 (1982) (holding that the views of a lawyer contained in briefs filed in court on behalf of an administrative agency should not be accepted as an authoritative construction of an act by the agency charged with administering the act). Second, there is certainly no evidence in this case of

[1] Before the Court of Claims, the Department relied on an unauthenticated memorandum dated October 20, 1995 and attached as Appellant's Appendix p 10a. The memorandum should be disregarded because it is unauthenticated. Furthermore, even if the memorandum was authenticated, it is dated after the tax years at issue in this case, and almost 20 years after the SBTA was enacted. Therefore, even if the memorandum was evidence of the Department's current interpretation of Section 53(c), it is not evidence of the Department's interpretation during the Years In Issue and is most certainly not a longstanding interpretation.

a longstanding administrative interpretation, which is the type of interpretation to which courts afford great deference. *See In re Michigan Cable Telecommunications Ass'n Complaint*, 239 Mich App 686, 690; 609 NW2d 854 (2000). Third, even if there was a longstanding administrative interpretation at issue, an administrative interpretation "cannot overcome the plain meaning of a statute." *Consumers Power Co v Public Service Comm*, 460 Mich 148, 157, n 8; 596 NW2d 126 (1999).

C. Fluor's Interpretation Does Not Render Section 53(c) Superfluous.

The Department contends that Fluor's interpretation of Section 53(c) would render that section coextensive with Section 53(a) and therefore superfluous. *See* Department's Cross-Appellee Brief at 6. This is clearly untrue. Section 53 provides:

> Sales, other than sales of tangible personal property, are in this state if:
> (a) The business activity is performed in this state.
> (b) The business activity is performed both in and outside this state and, based on costs of performance, a greater proportion of the business activity is performed in this state than is performed outside this state.
> (c) Receipts derived from services performed for planning, design, or construction activities within this state shall be deemed Michigan receipts.

Section 53(a) clearly applies to business activity that is solely performed in Michigan. Section 53(b) and (c) apply to business activity that occurs both in and outside Michigan. Section 53(c) provides a special rule for construction related activities. Those activities are sourced to the state in which they occur.

A simple example can demonstrate that Fluor's interpretation of Section 53(c) does not render it coextensive with Section 53(a). Consider, for example, the case of a largely prefabricated building which is designed in Ohio, the major components of which are built in Ohio, and then are shipped into Michigan where the building is assembled and affixed to a foundation. Section 53(a) does not apply because the business activity was performed both inside and outside of Michigan. However, Section 53(c) would source to Michigan those

receipts derived from services performed within Michigan (in this case, the receipts for the assembly of the components in Michigan and affixing the building to its foundation). This simple example shows that Section 53(c) is not coextensive with Section 53(a). The Department's argument that Fluor's interpretation of Section 53(c) would render Section 53(a) nugatory is therefore baseless.[2] In contrast with the Departments position, Fluor's position is based on the plain language of Section 53(c), which clearly requires only receipts received from services performed "within this state" to be allocated to Michigan.

In contrast with the Department's position, Fluor's position is based on the plain language of Section 53(c), which clearly requires only receipts received from services performed "within this state" to be allocated to Michigan.

D. The Department's Alleged "Legislative History" Is Irrelevant And Incompetent.

The Department invites the Court to interpret and rewrite Section 53(c), rather than merely apply it, by resorting to alleged "legislative history." See Department's Cross-Appellee Brief at 6-7. This attempt, however, is unavailing for at least two reasons: (1) the Court is precluded from resorting to legislative history; and (2) the material advanced by the Department is not legislative history.

1. The Court Cannot Consider the Department's Alleged "Legislative History."

The Department seeks to use "legislative" history to persuade the Court to ignore the plain meaning of Section 53(c). This cannot be done. A court cannot resort to legislative history to overcome the plain meaning of a statute. *See People v Guerra,* 469 Mich 966, 671 NW2d

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[2] Indeed, the facts of this case demonstrate that Fluor's position does not render Section 53(c) surplusage. Fluor's business activities occurred in more than one state, so Section 53(a) does not apply but Section 53(c) does.

535 (2003). Furthermore, there is nothing in the purported "legislative history" advanced by the Department that aids in construing Section 53(c). The letter proffered by the Department as "legislative history" does not even discuss how Section 53(c) is to be applied, which is the question before the Court.

Furthermore, Michigan courts generally do not consult legislative history when interpreting statutes. As the Court of Appeals held in *People v Tolbert*, 216 Mich App 353, 360 n 5; 549 NW2d 61 (1996):

> It has been observed in the federal context that resort to 'legislative history' in the search for legislative intent is a perilous venture. *Marposs Corp. v Troy*, 204 Mich App 156, 167-168, n. 2, 514 N.W.2d 202 (1994) (Taylor, P.J., dissenting), quoting Address by Justice Antonin Scalia before the Attorney General's Conference on Economic Liberties (June 14, 1986). This enterprise is doubly fraught with danger in Michigan which, unlike Congress, has failed to create an authoritative legislative record.

Likewise, the Court recently held that, "in Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction." *Lynch v Flex Technologies*, 463 Mich 578, 587; 624 NW2d 180 (2001). It would therefore be improper for the Court to consider the letter advanced by the Department.

2. The Letter Advanced by the Department is Not "Legislative History."

As the *Tolbert* Court noted, there is no authoritative legislative record in Michigan. Therefore, there is no accepted definition as to what materials qualify as "legislative history" in Michigan. By any definition, however, the letter proffered by the Department would not qualify. In *Lynch,* the Court even cautioned against relying upon official bill analyses. According to the Court:

> The problem with relying on bill analyses is that they do not necessarily represent the views of even a single legislator. Rather, they are prepared by House and Senate staff. Indeed, the analyses themselves note that they do not constitute an official statement of legislative intent.

Lynch, 463 Mich at 588, n 7.

If a legislative analysis prepared by legislative staff cannot be used to determine the views of the Legislature, then the letter proffered by the Department surely cannot be. The letter purports to be prepared by Mr. Stephen Wagner, the Executive Director of the Consulting Engineers Council of Michigan, Inc. While this letter, if properly authenticated, might be useful to determine Mr. Wagner's views, it sheds no light on the views of even a single legislator, let alone the entire Legislature. Indeed, there is no evidence that a single legislator ever saw or even considered the letter.

Furthermore, the letter has not been authenticated, and therefore cannot be considered by the Court. *See* MRE 901 (before being admissible, there must be evidence that the matter in question is what its proponent claims). The parties stipulated to several facts in this matter but never stipulated to the authepnticity or relevance of the Wagner letter.[3] As a consequence, it cannot be considered.

E. The Architectural and Engineering Activities at Issue Were Not "Consumed" in Michigan; But Even If They Had Been, It Is Performance and Not Consumption That the Statute Embraces.

The Department argues in its Brief that the architectural and engineering services at issue, which were undisputedly rendered outside the state of Michigan, were nonetheless "consumed" in Michigan, causing its receipts for these services to become Michigan sales. *See* Department's Cross-Appellee Brief at 7, 10. This is clearly both untrue and irrelevant.

The SBT is a consumption-based value added tax. *Mobil Oil v Dep't of Treasury*, 422 Mich 473, 496-97; 373 NW2d 730 (1985). A consumption-based value added tax measures

[3] The Department failed to inform both the Court of Claims and this Court where it obtained the Wagner letter, whose handwriting is contained in the handwritten notes contained on the proffered copy of the Wagner letter, whether any legislators actually saw the Wagner letter, or whether there are other such materials in existence.

taxable economic activity based upon the cost an economic actor incurs to acquire and consume the scarce productive resources of society. *Id.* at 493. These scarce productive resources are labor, plant/equipment, capital and intangible property. *Id.* The value of the resource consumed by the economic actor is measured in the tax base by the amount the economic actor pays for the resource. In the case of labor, the consumption cost is the compensation paid to retain the services of the employee. *Id.* at 493-94. In the case of plant/equipment consumed over a number of years, the consumption cost is measured by the amount by which the plant/equipment depreciates from use by the economic actor and the federal depreciation deduction is used to measure this consumption. In the case of capital, consumption by the economic actor is measured by the interest paid by the economic actor to acquire the capital. In the case of intangible property, the consumption cost is measured by the amount paid by the economic actor in royalty expense for the use of the patents, trademarks and copyrights of another. All of these consumption costs are added together to arrive at the SBT value added tax base. Thus, the concept of consumption in the context of the SBT focuses on what the taxpayer consumes in conducting its business activity. The taxpayer here is Fluor, not Fluor's customer. Therefore, when the Department argues "consumption" of the design services as occurring in Michigan, it intentionally skews the focus of the SBT away from consumption by the taxpayer and toward consumption by the taxpayer's customer. This concept is foreign to the SBT and proves the error of the Department's position.

The labor of the employee rendering the design service is consumed by Fluor, not Fluor's customer. Such "consumption" occurred outside Michigan. The employees' labor was applied to the assigned tasks in other states, such as California, Texas, Illinois and South Carolina. *See* SOF, ¶ 7 ("The receipts at issue in this case relate to receipts received by Fluor for engineering

and architectural services performed by Fluor employees outside of Michigan . . ..”); SOF, ¶ 8 (“Fluor did not engage in engineering and/or architectural planning or design services within the State of Michigan.”); SOF, ¶ 9 (“Fluor engaged in engineering and/or architectural planning and design activities at its engineering facilities located in Greenville, South Carolina; Houston, Texas; Chicago, Illinois; and Irvine, California.”). Although labor is considered an element of consumption that is taxed in the tax base of the SBT,[4] that is a question of tax base content, not how the tax base, once assembled, is apportioned among the states. That is why the apportionment statute, Section 53(c), speaks of “services performed,” not services consumed. The Department cites no authority in support of its novel proposition that labor performed outside Michigan should be considered “consumed” in Michigan for SBT apportionment purposes. No support exists for that proposition.

The Department argues on page 10 of its Cross-Appellee Brief that “Michigan is not taxing Fluor’s California services but rather recognizing the value added to Michigan’s economy by Fluor’s Michigan projects. . . . it is the value added to Michigan’s economy by these projects that is being taxed.” This argument is incorrect. What is taxed by the SBT is Fluor’s SBT base. It is undisputed that Fluor’s receipts for all of its services are included in Fluor’s SBT base. The issue before the Court is not the amount of Fluor’s tax base, it is how that tax base is apportioned to Michigan. The parties have stipulated that Section 53(c) controls in determining how to apportion Fluor’s tax base. *See* SOF, ¶ 22. Section 53(c) clearly requires that, when considering sales of services, the only relevant consideration is where the services are performed.

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[4] *See Trinova Corp v Dep’t of Treasury,* 433 Mich 141, 150; 445 NW2d 428 (1989) (holding that the SBT base includes additions to reflect the business consumption of labor); *Mobil Oil Corp v Dep’t of Treasury,* 422 Mich 473, 495; 373 NW2d 730 (1985) (same).

Thus, the location of the "consumption" is irrelevant. Section 53(c) does not use the term "consumption." Rather, Section 53(c) sources to Michigan services "performed . . . within this state . . . ." It has been stipulated that the services at issue were performed outside Michigan. *See* SOF, ¶¶ 7-9. This argument highlights how the Department must add language not contained in the statute in order to prevail.

F. Any Ambiguity Or Doubt In Interpreting Section 53 Must Be Resolved In Favor of Fluor.

Taxation statutes must be strictly construed, and all doubt, uncertainty and ambiguity must be resolved in favor of the taxpayer. *Ford Motor Co v State Tax Comm'n*, 400 Mich 499, 506; 255 NW2d 608 (1977). An interpretation advocated by the taxpayer that is consistent with the statute must prevail. *See A. Z. Schmina & Sons, Inc. v Dep't of Treasury*, 203 Mich App 187, 191-92; NW2d 57 (1993). As demonstrated above, not only is Fluor's interpretation consistent with the statute, it is the only position consistent with the statute.

III. CONCLUSION

Section 53(c) clearly only requires revenues from planning and design activities performed within Michigan to be included in the sales factor numerator as Michigan receipts. This is so because the statute refers to "services performed for planning, design or construction activities <u>within this state</u>." This is the interpretation by the Court of Claims below. The Department's position requires a tortured construction of Section 53(c) and would result in Section 53(c) being unconstitutional. The Department's tortured construction and reliance upon alleged "legislative history" show the weakness of the Department's position. Fluor respectfully requests that the Court reverse the Court of Appeals and embrace the construction of Section 53(c) adopted by the Court of Claims.

Respectfully submitted,

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