

IN THE SUPREME COURT  
APPEAL FROM THE COURT OF APPEALS

Fitzgerald, P.J., Wilder and Murray, JJ.

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ANDRIE INC.,

Plaintiff-Appellee,

Supreme Court No. 145557

Court of Appeals No. 301615

Court of Claims No. 08-95-MT

v

DEPARTMENT OF TREASURY,  
STATE OF MICHIGAN,

Defendant-Appellant.

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**AMICUS CURIAE BRIEF OF  
THE MICHIGAN CHAMBER OF COMMERCE**

MICHIGAN CHAMBER OF COMMERCE

By: James R. Holcomb (P53099)  
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## QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that a retail transaction in Michigan subject to the Sales Tax Act, MCL 205.51 *et seq.*, is not subject to the Use Tax Act, MCL 205.91 *et seq.*

Plaintiff-Appellant/Appellee answers, "Yes."

Defendant-Appellee/Appellant answers, "No."

Court of Claims answers, "Yes."

Court of Appeals answers, "Yes."

Proposed Amicus Curiae Michigan  
Chamber of Commerce answers, "Yes."

2. Whether a retail purchaser is entitled to a presumption that sales tax is paid on retail transactions in Michigan.

Plaintiff-Appellant/Appellee answers, "Yes."

Defendant-Appellee/Appellant answers, "No."

Court of Claims answers, "Yes."

Court of Appeals answers, "Yes."

Proposed Amicus Curiae Michigan  
Chamber of Commerce answers, "Yes."

3. Whether the exemption in MCL 205.94(1)(a) applies in this case.

Plaintiff-Appellant/Appellee answers, "No."

Defendant-Appellee/Appellant answers, "Yes."

Court of Claims answers, "No."

Court of Appeals answers, "No."

Proposed Amicus Curiae Michigan  
Chamber of Commerce answers, "Yes."

## **I. STATEMENT OF INTEREST OF AMICUS CURIAE**

The Michigan Chamber of Commerce (the "Chamber") is a nonprofit corporation representing over 7,000 members, all of whom are private enterprises engaged in an array of civic, professional, commercial, industrial, and agricultural activity in Michigan. Since its founding in 1959, the Chamber has sought to engage decision makers at all levels of government with the hope that the continual development of law and public policy will keep Michigan economically competitive and make the State attractive as a place to live and work. With this goal in mind, the Chamber has participated in lawsuits to ensure that courts are aware of how business is conducted in Michigan and are mindful of the impact court decisions have on the business operations and economic development in this State.

Amicus Curiae Michigan Chamber of Commerce is concerned about the effect of the Michigan Department of Treasury's (the "Department") proposed systematic imposition of double taxation on Michigan businesses and the negative effect of this unsanctioned duplicative taxation on the business industry in Michigan. The decision below properly ensures that Michigan businesses and all Michigan taxpayers are only subject to tax once on each item of tangible property purchased from a Michigan retailer. In contrast, double taxation on purchases improperly increases the costs of doing business in Michigan. No other state imposes both sales and use tax on the same transaction, thereby putting Michigan at an economic disadvantage in trying to engage in economic development and attract new businesses. The Department's proposed sales and use tax interpretation results in a tax structure that discourages businesses from locating in Michigan where they will be potentially subject to double taxation. Moreover, the Department's proposed interpretation of the sales and use tax statutes will discourage purchases from Michigan retailers because only these purchases may be subjected to both sales tax and use tax if tax is not listed on an invoice, even if remitted.

The Department's position that both sales and use tax can and should be imposed on the same transaction contradicts the fundamental complementary nature of the sales and use taxes. The purpose of the use tax is to ensure that sales and purchases that are not subject to the sales tax are nonetheless subject to a transactional tax – the use tax – when the tangible personal property is ultimately used in Michigan. The Department seeks to make the use tax an entirely separate tax that is imposed regardless of the imposition of the sales tax. This establishes a basic structure of double taxation on all purchases from a Michigan retailer.

The Department's suggestion that Michigan business purchasers can prove when the sales tax is paid effectively shifts liability for the sales tax to the purchaser. Moreover, the Department refuses to disclose when the Michigan retailer has remitted sales tax, citing taxpayer confidentiality. The Department's position of "prove the tax was paid but we won't tell you if it was" creates an intolerable catch-22 for Michigan businesses. Because the Department refuses to ascertain if the Michigan retailer paid the sales tax, it is purposefully turning a blind eye to the duplicative nature of its use tax imposition. It is simply wrong for the Department to attempt to establish an interpretation of the law that inevitably leads to double taxation, particularly without any legislative authorization. Michigan businesses should not arbitrarily be subjected to double taxation.

The Court of Appeals' decision<sup>1</sup> below properly eliminates the potential for double taxation in accordance with this Court's prior precedent. The Department's proposed position imperils the economic vitality of Michigan retailers' business in this State. All business entities need financial certainty. They need to plan budgets. They need to ensure that their financial resources are invested wisely, costs are kept low, and receivables are fully collected. Amicus

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<sup>1</sup> *Andrie, Inc v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued July 14, 2009 (Docket No. 286600), App 43a.

Curiae members have relied on Michigan's historic treatment of sales by Michigan retailers as being subject to one tax – the sales tax. The Department's recommended overruling of this body of law is unsupported by law or policy. It exposes Amicus Curiae members to the increased audit scrutiny and litigation over whether use tax is now due on sales tax transactions. It creates a new taxing power for the Department to impose use tax on Michigan retail sales. All retroactive audit assessments can go back for at least four years on Michigan business purchases from Michigan retailers.

Amicus Curiae asks this Court to create the certainty needed in the application of sales and use tax to retail transactions by Michigan retailers. This Court should affirm that use tax is not due on sales tax transactions. The plain language of the Sales Tax Act, MCL 205.51 *et seq.* (hereinafter "Sales Tax Act"), the Use Tax Act, MCL 205.91 *et seq.* (hereinafter "Use Tax Act"), and multiple appellate decisions from this Court hold that the sales and use taxes are complimentary and not overlapping taxes. When sales tax is imposed, use tax is not also imposed. This Court has regularly rejected philosophical, revenue driven agency explanations of statutes and statutory intent in a number of recent sales tax cases for the certainty and constitutionally required limitations found in plain statutory language. Amicus Curiae submits that a business environment which lacks court oversight of agency interpretation of statutes imbalances the division of governmental power. It replaces legislative intent with the "gotcha" form of tax administration. The Court of Appeals' decision upholds a long-held statutory collection scheme that has been consistently upheld by Michigan courts. Amicus Curiae requests that this Court grant its motion to file briefs in this case and affirm the decision of the Court of Appeals below.

## **II. STATEMENT OF FACTS**

Amicus Curiae relies on the factual background contained in Plaintiff-Appellant/Appellee's Brief.

## **III. STANDARD OF REVIEW.**

This Court reviews de novo the Court of Appeals' affirmance of the Court of Claims' grant of summary disposition. *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006).

Tax statutes are strictly construed, but when the Department seeks an expansion of its taxing authority, tax statutes are narrowly construed in favor of taxpayers. *In re Dodge Bros*, 241 Mich 665, 669; 217 NW 777 (1928). To preserve the separation of powers provided in the Michigan Constitution, the Department of Treasury's interpretation of a statute is subject to de novo review. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 102-103; 754 NW2d 259 (2008). The constitutionally required standard of review is whether the Department's interpretation conflicts with the statute. *Id.* at 108. When there is no conflict, the Department's interpretation of a statute is entitled to respectful consideration. *Id.* The Department's interpretation cannot conflict with the plain meaning of the statute, and, to ensure that limitation is maintained, the Department's interpretation is not binding on reviewing courts. *Id.*

## **IV. ARGUMENT**

### **A. Use Tax May Not Be Imposed on Transactions Subject to Sales Tax.**

The Department may not interpret the law so as to impose use tax indirectly when this Court has prohibited the use tax's direct imposition. Amicus Curiae submits that the Department's proposed interpretation of the Use Tax Act does just this, and creates new unauthorized taxing authority and unconstitutionally exceeds the limitation on the sales tax rate in violation of Const 1963, art 9, § 8.

This Court has held that the Legislature's enactment of a statute imposing 1% use tax on retail sales in Michigan that were already subject to 3% sales tax violates the Michigan Constitution's limit on the imposition of sales tax under Const 1963, art 9, § 8. *Lockwood v Comm'r*, 357 Mich 517; 98 NW2d 753 (1959). In this case, the Department seeks to impose a 6% use tax on retail sales in Michigan that are already subject to the 6% sales tax, all without specific statutory authority. Thus, the Department is attempting to accomplish indirectly, through creative statutory interpretation, what this Court has ruled unconstitutional when done directly. All the transactions at issue are sales at retail in Michigan subject to the 6% sales tax. For the Department to impose an additional 6% use tax through "interpretation of the use tax exemption provisions" results in a violation of the limitation of sales tax under Const 1963, art 9, § 8, the same as if the Legislature has enacted an additional 6% use tax upon all Michigan retail transactions. The Department's proposed interpretation of the law is unconstitutional.

This Court has long held that the sales tax and the use tax are complimentary so that the use tax applies only when the sales tax does not. *Elias Bros Restaurants v Dep't of Treasury*, 452 Mich 144, 146 n 1; 549 NW2d 837 (1996); *World Book, Inc v Dep't of Treasury*, 459 Mich 403; 590 NW2d 293 (1999); *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 237; 644 NW2d 734 (2002); *Catalina Marketing Sales Corp v Dep't of Treasury*, 470 Mich 13, n 3; 678 NW2d 619 (2004). See also *Discount Tire Co v Dep't of Treasury*, 298 Mich App 367; 826 NW2d 769, 774 (2012). The Department's argument that the sales and use tax are "overlapping" so that use tax may be applied when sales tax is imposed is contrary to this long line of case law and wrong.

The Department's arguments that no double taxation will result because the purchaser can prove that sales tax was paid is disingenuous. This argument turns the liability for sales tax

on its head. For the reasons discussed in Section B below, the purchaser is required to prove payment of tax when the purchaser has no information to do so. This is improper when the liability for sales tax is plainly upon the Michigan retailer, not the purchaser.

**B. Michigan Purchasers Should Not Have to Prove They Paid the Sales Tax When the Sales Tax Is Imposed Upon the Michigan Retailer.**

The Department admits that all sales by Michigan retailers at issue were subject to the Sales Tax Act. The Department further admits, as it must, that the obligation to pay the sales tax is upon the Michigan retailer. MCL 205.52(1). It is the Michigan retailer that is required to remit sales tax on all of its sales in Michigan to the Department. This should end the inquiry on liability for tax on the sales transaction occurring in Michigan. The Sales Tax Act is clear that the liability for the tax is upon the retailer.

Yet, the Department seeks to impose a second tax, the use tax, on the sales transaction if the purchaser cannot prove the Michigan retailer paid the tax. In essence, the Department seeks to create a sales tax enforcement obligation upon the purchaser with the penalty for failure to enforce being the imposition of a 6% use tax. The Department asks this Court to require the Michigan purchaser to prove that the Michigan retailer paid the sales tax or to pay an additional 6% use tax on the sales taxable transaction. There is simply no basis in either the Sales Tax Act or the Use Tax Act for this Court to create an obligation upon all Michigan purchasers to prove the Michigan retailer's compliance with the Sales Tax Act. In fact, the burden of enforcing the Michigan retailers' tax obligations is specifically given to the Department. See MCL 205.21(1). Moreover, the Department has been given the tools to undertake this enforcement activity. All Michigan retailers are required to register with the Department so that the Department has names, addresses and contact information. MCL 205.53(1). All Michigan retailers are required to remit sales taxes on a monthly, quarterly or yearly basis. The Department has a large cadre of

auditors whose sole duty is to audit and enforce sales taxes.

In contrast, the purchaser merely purchases property from the Michigan retailer in a transaction that all parties admit is subject to the Sales Tax Act. The purchaser has no control over the Michigan retailer's election not to collect. When a Michigan retailer pays the sales tax directly to the Department and does not elect the option of collecting the tax from the purchaser under MCL 205.73(1), the retailer and the purchaser have fully complied with the Sales Tax Act. Under the plain language of MCL 205.73(1), once the Michigan retailer elects not to collect sales tax from the purchaser, the Michigan retailer cannot claim that the sales tax amount was not included in the price paid by the purchaser. Thus, as between the Michigan retailer and the purchaser, once the transaction is completed without the collection of sales tax from the purchaser, there is no further basis for the Michigan retailer to attempt a subsequent collection of sales tax from the purchaser. This Court has repeatedly held that the purchaser can rely upon the presumption that the sales tax was included in the purchase price. See, e.g., *Sims v Firestone Tire & Rubber Co*, 397 Mich 469; 245 NW2d 13 (1976); *Swain Lumber Co v Newman Dev Co*, 314 Mich 437; 22 NW2d 891 (1946).

Further, the purchaser has no information about the Michigan retailer's sales remittance procedures, as the remittance is made to the Department with no reporting obligation to the purchaser. Yet, the Department seeks to require the purchaser to prove the payment of sales tax by the retailer. There is simply no basis in the statute for the Department to impose this new tax enforcement obligation upon purchasers in light of the plain language of MCL 205.73 and this Court's prior rulings.

**C. The Use Tax and Use Tax Exemptions Do Not Apply to Sales At Retail in Michigan.**

The sales tax applies to all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration. MCL 205.52. All parties admit that the sales tax applies to the transactions at issue. Testimony of James Bartkowiak (hereinafter "Auditor Testimony"), Trial Tr at 115:11-23, App 75a. The use tax, by its plain language, does not apply to sales at retail in Michigan.<sup>2</sup> Thus, the use tax does not apply. Given that the use tax does not apply, the use tax exemptions do not apply. An exemption reduces the amount of the tax imposed. See *DeKoning v Dep't of Treasury*, 211 Mich App 359, 362; 536 NW2d 231 (1995). An exclusion from the tax base prevents certain transactions from being included in the amount of the taxpayer's tax base in the first place. If the transaction is not initially taxed, then it cannot be said that the exclusion of the transaction from consideration reduces the amount of the tax. *Manske v Dep't of Treasury*, 265 Mich App 455, 458; 695 NW2d 92 (2005). In this case, the retail sales at issue are excluded from the use tax base and are not subject to use tax in the first place. Thus, there is no basis to require an exemption to further exclude these retail transactions from use tax when the transactions are not included in the taxable base.

**V. CONCLUSION**

Amicus Curiae requests that this Court permit Amicus Curiae to file briefs in this appeal and hold that, under this Court's prior rulings, a retail transaction in Michigan is subject to the Sales Tax Act, not the Use Tax Act, and, accordingly, exemptions under the Use Tax Act are not applicable to these transactions excluded from the use tax base.

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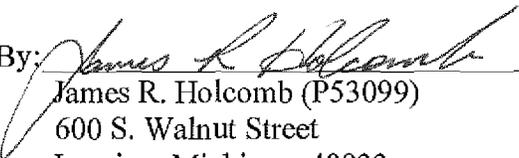
<sup>2</sup> The use tax applies to every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state. MCL 205.92.

Moreover, retail purchasers are entitled to rely upon the presumption that sales tax is included in the price paid under the plain language of MCL 205.73 and this Court's prior decisions.

Respectfully submitted,

MICHIGAN CHAMBER OF COMMERCE

Dated: March 27, 2013

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