STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Fitzgerald, P.J., Wilder and Murray, JJ.

ANDRIE INC.,

Plaintiff-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellant.
_____/

Supreme Court No. 145557

Court of Appeals No. 301615

Court of Claims No. 08-95-MT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

BRIEF ON APPEAL OF APPELLANT DEPARTMENT OF TREASURY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court has jurisdiction under MCR 7.301(2) and the Court's Order of December 5, 2012, granting Treasury's Application for Leave to Appeal.

STATEMENT OF QUESTIONS PRESENTED

The Sales Tax Act imposes on retailers a tax for sales of tangible personal property. MCL 205.52(1). The Use Tax Act imposes a tax on a retail purchaser for the privilege of using, storing, or consuming tangible personal property in this State. MCL 205.93(1). While distinct regimes, the Sales and Use Taxes are complementary: they guarantee that a taxpayer is not forced to pay both sales and use tax on the same tangible personal property, while ensuring that the State always receives 6% for the sale or consumption of tangible personal property. This Court has asked the parties to address the following three questions:

1. Whether the Court of Appeals correctly determined that a retail transaction occurring in Michigan subject to the sales tax, MCL 205.51 *et seq.*, is not subject to the use tax, MCL 205.91 *et seq*...

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Appeals' answer: Yes.

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

   Appellant's answer: No.

   Appellee's answer: Yes.

   Court of Appeals' answer: Yes.

3. Whether the exemption in MCL 205.94(1)(a), the exemption from use tax applicable where the taxpayer has actually "*paid*" the sales tax, applies in this case, where Andrie did not allege it paid the sales tax.

   Appellant's answer: No.

   Appellee's answer: No.

   Court of Appeals' answer: The Court did not address this issue.

STATUTES INVOLVED

MCL 205.93(1) (Use Tax)

There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property *in this state* at a rate equal to 6% of the price of the property or services specified in section 3a or 3b.

MCL 205.94(1)(a) (Use-Tax Exemption)

Property sold in this state on which transaction a tax is *paid* under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, if the tax was due and *paid* on the retail sale to a consumer.

MCL 205.52(1) (Sales Tax)

[T]here is levied upon and there *shall be collected from all persons engaged in the business of making sales at retail*, by which ownership of tangible personal property is transferred for consideration, an annual *tax for the privilege of engaging in that business* equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act.

MCL 205.73(1) (Advertisement; amounts added to sales prices for reimbursement purposes; brackets; tax imposed under tobacco products tax act)

A person engaged in the business of selling tangible personal property at retail shall not *advertise or hold out to the public in any manner*, directly or indirectly, that the tax imposed under this act is not considered as an element in the price to the consumer. This act does not prohibit any taxpayer from reimbursing himself or herself by adding to the sale price any tax levied by this act.

INTRODUCTION

This is a use tax dispute that has multi-billion-dollar implications for Michigan's Treasury and the potential to undermine well-established principles of statutory construction and burdens of proof, particularly those that pertain to tax statutes. It arises out of a business taxpayer's purchase of tangible personal property that the taxpayer used and consumed in Michigan.

The Sales Tax Act and the Use Tax Act relate to entirely separate taxable events: sale and use. In tandem, these taxes ensure that a 6% tax is *always* paid on all tangible personal property, in the form of the sales tax (at the time of purchase) or the use tax either (when the property is used or consumed). In the absence of a statutory exemption, tangible personal property that is first sold and then used in Michigan is subject to *both* taxes.

In MCL 205.94(1)(a), the Legislature created a use-tax exemption when sales tax is actually "paid" on the same tangible personal property. The statute thus imposes an obligation on a consumer to demonstrate that it is entitled to the exemption, because the consumer is in the best position to know whether it paid sales tax. Business consumers commonly satisfy this burden by producing an invoice or sales receipt showing payment of the 6% sales tax. (The consumer need not prove that the vendor paid the State.) But the Court of Appeals has now turned this system on its head, requiring *Treasury* to demonstrate that sales tax was *not* collected. This is a sea change in the tax laws and makes no sense.

In particular, Andrie claimed it was exempt from use tax based on nothing more than its contention that the property at issue was "subject" to sales tax.

Andrie has not proved or even alleged that sales tax has actually been "paid," as MCL 205.94(1)(a)'s plain language requires. Nonetheless, the Court of Appeals held that Andrie was not subject to the use tax, relieving Andrie of its burden to prove entitlement to an exemption and effectively removing the specific requirement for the exemption. This is inconsistent with the statutory language and common sense; a taxpayer *always* bears the burden to prove eligibility for an exemption.

Consider the practical consequences of the Court of Appeals' rule. Assume that Andrie purchases tangible personal property from 50 different vendors, and then consumes that property in the course of its business operations. Ten of the vendors never collect from Andrie (or pay to the State) the 6% sales tax, then go bankrupt. Andrie is a sophisticated business, and the lack of payment of the sales tax is obvious at the time of the transactions, so Andrie knows it is (1) not eligible for the exemption, and (2) liable for the 6% use tax. But Andrie refuses to produce the sales receipts and says the vendors are responsible for the sales tax. That refusal forces Treasury to audit all 50 vendors, only to determine that Andrie owes use tax on 10 transactions. This scenario is exactly the opposite of how tax audits are supposed to work. And the limitations period may have expired as to solvent vendors, causing Treasury to have wasted its resources pursuing the vendors.

If the Legislature had prescribed such a scheme, Treasury would have to scrutinize the (confidential) tax records of third-party vendors just to determine the tax liability of the taxpayer. But that is not what the Legislature did, and for good reason. Instead, the Legislature (1) imposed a 6% sales tax *and* a 6% use tax to

ensure that a 6% tax is paid on *all* tangible personal property, and (2) created an exemption only if a consumer can prove sales tax was paid on the retail transaction. I.e., the Legislature placed the burden of proof on the taxpayer, not Treasury.

The Court of Appeals' analysis lends itself to easy circumvention of the 6% tax Michigan expects to receive on all tangible personal property. Indeed, because the Court of Appeals relieved Andrie of its burden of proof, it is entirely possible that *no* 6% tax has ever been paid on the property at issue here.

For all these reasons, and those discussed more comprehensively below, Treasury respectfully requests that this Court vacate Paragraph II.C of the Court of Appeals' April 26, 2012 opinion and hold that (1) a retail transaction in Michigan subject to the sales tax is exempt from the use tax under MCL 205.94(1)(a) *only* if the sales tax is actually "paid," (2) it remains a consumer's burden to prove that sales tax has been paid to receive the benefit of MCL 205.94(1)(a)'s exemption; and (3) the MCL 205.94(1)(a) exemption does not apply in this case because Andrie failed to prove that sales tax was paid on the property at issue.

STATEMENT OF FACTS

I. Andrie's marine transportation business

Andrie is a Michigan Corporation with headquarters in Muskegon, Michigan. (App 64a.) Andrie is engaged in marine construction and marine transportation. *(Id.)* The marine transportation division transports petroleum products, cement, asphalt and asphalt related products for its customers to locations in Michigan, Indiana, Wisconsin, Illinois, Ohio, New York and Canada. (*Id.* at 64a-65a.) Andrie uses tugboats and barges to transport products for its clients. (*Id.* at 64a.)

II. Use-tax audit

Treasury conducted a use tax audit of Andrie covering two time periods: November 1, 1999, through December 31, 2004, and January 1, 2005, through July 31, 2006. (App 67a-68a.) One objective of the audit was to determine whether there existed any differences between Andrie's reported use tax liability and the correct use tax liability. (*Id.* at 125a, 133a.) The audit was conducted over a period of six to nine months. (*Id.* at 68a.)

During the course of the audit, Treasury's auditor conducted a detailed review of Andrie's purchases, including capital expenses and expense items. (App 68a; *Id.* at 125a-195a.[1]) Treasury reviewed the available invoices, books, and for the proper application of tax. (*Id.* at 67a-68a; 125a-195a.) Where the auditor determined an item was taxable, as is the case in all use tax audits, he requested

[1] The audit worksheets and schedules for the second audit period are included in the appendix as a representative example. The audit worksheets and papers for the first audit were marked as the parties' Joint Trial Exhibit 48.

that Andrie provide information that the item was exempt from tax or that sales tax was paid. (*Id.* at 75a.) If Andrie produced a receipt showing that it paid sales tax, Treasury did not assess use tax. (*Id.* at 75a; 125a-195a.) But if Andrie could not or would not prove that sales tax was paid, Treasury assessed Andrie for use tax. (*Id.* at 69a; 75a; 125a-195a.)

As a result of the audit, Treasury determined that Andrie understated its use tax liability. Treasury assessed use tax in the amount of $560,910.00 for the period of November 1, 1999, through December 31, 2004, and $214,428.00 for the time period January 1, 2004, through July 31, 2006. Thereafter, an informal conference was requested and held. Following the informal conference, Treasury adjusted the amount of taxes, penalties and interest due relative to the November 1, 1999, through December 31, 2004 audit period from $560,910.00 to $398,755.00. (App 67a; 96a; 102a.) With respect to the final assessments, Treasury imposed use tax on fuel and supply purchases Andrie made in Michigan, from Michigan retailers, where Andrie was unable to prove its right to a use-tax exemption under MCL 205.94(1)(a), i.e., that sales tax had been "paid" on these transactions.

PROCEEDINGS BELOW

I. Court of Claims

Andrie paid the assessments under protest and filed suit in the Court of Claims. The only ground at issue in this appeal is Andrie's claim that Treasury improperly assessed use tax on purchases already subject to sales tax, which is Count III of its Amended Complaint. (App 88a.)

In its Complaint, Andrie acknowledged that the Use Tax Act precludes assessment of use tax when sales tax has been paid on a sale. (App 88a.) But Andrie did not allege that it paid sales tax on the subject transactions. (*Id.* at 79a-93a.) Instead, Andrie alleges that it was "entitled to rely upon the requirement of the Sales Tax Act that the sales tax was included in the price of the goods purchased regardless of whether the sales tax was separately stated." (*Id.* at 88a.)

Treasury maintained that the Use Tax Act only provides for an exemption where sales tax is actually *paid*. Treasury further maintained that Andrie had the burden to demonstrate it was eligible for an MCL 205.94(1)(a) exemption from use tax and failed to satisfy that burden.

Following a bench trial, the Court of Claims held that Andrie was entitled to a partial refund of use tax. The court agreed that, notwithstanding the plain language of MCL 205.94(1)(a), Andrie was entitled to a presumption that sales tax was included in the price of the goods it purchased and therefore did not have the obligation to provide proof it actually paid sales tax. (App 31a-32a.)

II. Court of Appeals

Treasury appealed. With respect to the use tax issue, the Court of Appeals affirmed, holding in its published decision that "the mere fact that a transaction is *subject* to sales tax necessarily means that the transaction is not subject to use tax." (App 44a.) "Because the retailer has the ultimate responsibility to pay any sales tax, it is erroneous to place a duty on the purchaser to show that the sales tax was indeed paid to the state. Thus, the transactions are not subject to use tax, and the trial court properly held in favor of plaintiff on this issue." (*Id.*)

Treasury sought a stay and reconsideration. The Court of Appeals denied both motions. On December 5, 2012, this Court granted Treasury's motion for stay and granted Treasury's Application for Leave to Appeal.

STANDARD OF REVIEW

This Court reviews *de novo* questions of law, including issues of statutory interpretation. *Klooster v City of Charlevoix*, 488 Mich 289, 295; 795 NW2d 578 (2011).

If the language of a statute is unambiguous, the Legislature intended the meaning clearly expressed, and the statute must be enforced as written; no further judicial construction is required or permitted. *Universal Underwriters Insurance Co v Kneeland,* 464 Mich 491, 499-500; 628 NW2d 491 (2001) (citing *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996)). "[I]n any question of statutory tax interpretation, . . . taxing is a practical matter and . . . the taxing statutes must receive a practical construction. While they will not be extended by implication . . . neither will the words thereof be so narrowly interpreted as to defeat the purposes of the act." *Michigan Bell Telephone Co v Dep't of Treasury*, 445 Mich 470, 478; 518 NW2d 808 (1994) (quoting *In re Brackett Estate*, 342 Mich 195, 205; 69 NW2d 164 (1955)). A construction which would render any part of a statute surplusage or nugatory is to be avoided. *Zwiers v Growney*, 286 Mich App 38, 44; 778 NW2d 81 (2009). Courts may not read into the statute what is not within the Legislature's intent as derived from the language of the statute. *AFSCME v City of Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003).

ARGUMENT

I. All tangible personal property in Michigan is subject to both sales and use tax. A retail purchaser is entitled to a use-tax exemption under MCL 205.94(1)(a) only if the purchaser proves that sales tax was actually "paid."

A. The use tax and the sales tax are complementary and overlapping, not mutually exclusive.

The Michigan Use Tax Act imposes a 6% tax on use, storage, and consumption of all tangible personal property in Michigan:

> There is levied upon and there shall be collected from every person in this state a specific tax for the privilege of using, storing, or consuming tangible personal property in this state at a rate equal to 6% of the price of the property or services specified in section 3a or 3b. [MCL 205.93(1).]

The Sales Tax imposes a 6% tax on the sale of all tangible personal property in Michigan:

> [T]here is levied upon and there shall be collected from all persons engaged in the business of making sales at retail, by which ownership of tangible personal property is transferred for consideration, an annual tax for the privilege of engaging in that business equal to 6% of the gross proceeds of the business, plus the penalty and interest if applicable as provided by law, less deductions allowed by this act. [MCL 205.52(1).]

It is critical to understand that while these two statutes work in tandem, they relate to entirely separate taxable events: sale and use.[2] In the absence of a

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[2] The facts of this case involve in-State retail transactions. But according to its clear terms, the Use Tax Act is applicable to every person (consumer) in Michigan who uses, stores or consumes tangible personal property in Michigan unless an exemption from tax applies. For example, a manufacturer/contractor that affixes its product to real estate in this State (MCL 205.93a(f) – (g)) is required to remit use tax on the property affixed. This is not a retail transaction, but is subject to use tax nonetheless.

statutory exemption, tangible personal property that is first sold and then used in Michigan is actually subject to *both* taxes. That is because nothing in either Act's imposition provision says that the use tax does not apply simply because the goods at issue are also "subject" to Michigan sales tax. To the contrary, the sales tax is a tax on a retailer's privilege of doing business in the State (the sale of tangible personal property at retail), while the use tax is a consumption tax (a consumer's use, storage, or possession of tangible personal property purchased).

Just as each tax is triggered by a separate taxable event, there is also a distinct legal incidence for each tax. In adopting a sales-use tax scheme, the Michigan Legislature imposed a uniform tax whether from the perspective of the retail seller (sales tax) or the consumer (use tax). *By Lo Oil Company v Dep't of Treasury*, 267 Mich App 19, 53; 703 NW2d 822 (2005). Accordingly, the legal incidence of sales tax falls on the retail seller for the privilege of engaging in retail sales. *Ammex, Inc v Dep't of Treasury*, 272 Mich App 486, 500; 726 NW2d 755 (2006). But the retailer is authorized to pass the economic burden of the sales tax onto the consumer by collecting an equal amount at the point of sale (i.e. seller reimburses itself by charging and collecting an amount equal to the tax from the consumer). *Id.* In contrast, the legal incidence of use tax falls solely on the consumer – taxpayer. *Terco, Inc v Dep't of Treasury*, 127 Mich App 220, 226; 339 NW2d 17 (1983). Thus, as this Court has recognized, the sales and use tax provisions are complementary and supplementary. *Don McCullagh, Inc v Revenue Dep't*, 354 Mich 413, 425; 93 NW2d 252 (1958).

If the Legislature had not created in MCL 205.94(1)(a) a use-tax exemption when sales tax is "paid" on the same tangible personal property, both sellers and purchasers/users would pay a 6% tax. And in that instance, Treasury would *not* be imposing two taxes on the same transaction, because sales and use tax relate to two wholly different taxable events.

Stated differently, an in-State retail transaction is taxable under the Sales Tax Act but not the Use Tax Act. A consumer's use, possession, or control over tangible personal property in Michigan is taxable under the Use Tax Act but not the Sales Tax Act. The use and sales taxes are thus complementary and somewhat overlapping, but they are not mutually exclusive.

B. A retail purchaser is entitled to a use-tax exemption only if the purchaser can prove that sales tax was "paid."

Of course, Treasury is not actually imposing simultaneously both sales and use tax on all tangible personal property sold and consumed in Michigan. That is because the Legislature created a statutory use-tax exemption, MCL 205.94(1)(a). But the exemption is only available if a consumer can show that sales tax was actually "paid":

> Property sold in this state on which transaction a tax is *paid* under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, if the tax was due *and paid* on the retail sale to a consumer. [MCL 205.94(1)(a) (emphasis added).]

As its plain language states, the exemption requires proof that sales tax was actually due "*and paid*" on tangible personal property, not merely that the property was "subject to" sales tax (as the Court of Appeals erroneously held). Importantly,

MCL 205.94(1)(a) does not require a consumer to prove that the retailer remitted the sales tax to the State, although such proof would also suffice; it is enough for the consumer to prove that it paid sales tax to the retailer. Ordinarily, Michigan businesses satisfy this undemanding requirement by submitting a sales receipt or invoice to Treasury showing the amount of sales tax the retailer charged and collected at the time of purchase.

This Court has confirmed the unambiguous import of MCL 205.94(1)(a) on multiple occasions. *General Motors v Dep't of Treasury*, 290 Mich App 355, 360; 830 NW2d 698 (2010). ("Property is exempt from use taxation if it is 'sold in this state on which transaction a tax is paid under the general sales tax act' and 'if the tax was due *and paid* on the retail sale to a consumer.' MCL 205.94(1)(a). Thus, the use tax 'applies to certain personal property transactions in which the seller does not collect a sales tax on behalf of the state.'") (emphasis added); *World Book v Dep't of Treasury*, 459 Mich 403, 408-409; 590 NW2d 293 (1999) (use tax does not apply to property sold in Michigan "*on which Michigan sales tax has already been paid.*") (emphasis added). So has the Court of Appeals. *Terco Inc v Dep't of Treasury*, 127 Mich App 220, 229; 339 NW2d 17 (1983), citing *National Bank of Detroit v Dep't of Revenue*, 334 Mich 132, 138-139; 54 NW2d 278 (1952) ("[T]he Use Tax Act, as written, does not limit its imposition to those properties purchased out-of-state and brought into Michigan. As a practical matter, most in-state purchases are exempt from the use tax, because of the exemption for property on which a sales tax is paid. Nonetheless, *the Legislature has not provided a use tax exemption covering in-state*

acquisitions of tangible personal property on which a sales tax is not paid. Absent an exemption, the use tax is applicable to the transfer of tangible personal property in this state.") (emphasis added).

There are opinions that take a shorthand approach when addressing the interplay between the Sales Tax Act and the Use Tax Act and gloss over the specific statutory language that dictates that sales tax must be "paid." Instead, these opinions summarily state that where a transaction is "subject to" sales tax, it is not subject to use tax. Unfortunately, the Court of Appeals relied on these cases instead of the plain and unambiguous statutory language.

For example, in *Combustion Engineering v Dep't of Treasury*, 216 Mich App 464; 549 NW2d 364 (1996), the taxpayer was a general contractor who paid sales tax to subcontractors in connection with the construction of a waste incinerator. The litigation emanated from the fact that while the general contractor paid sales tax to the subcontractor, there was no evidence that the subcontractor had remitted the tax to the State. The issue in *Combustion Engineering* became whether the State could require that a taxpayer carry the burden of proving that the sales tax it paid to the subcontractor was actually remitted to the State by the subcontractor.

The Court of Appeals held that the taxpayer (general contractor) does *not* have to prove that the retailer (subcontractor) actually remitted the sales tax it paid to the State. Treasury agrees with that conclusion. But *Combustion Engineering* does not stand for the point for which the Court of Appeals cited it, to wit, "[b]ecause the retailer has the ultimate responsibility to pay any sales tax, and it is

erroneous to place a duty on a purchaser to show that the sales tax was indeed paid to the state." (44a, citing *Combustion Engineering*, 216 Mich App at 469). Notably, in *Combustion Engineering*, the taxpayer's records proved (and Treasury agreed) that the taxpayer had "paid" the sales tax by remitting monies to the subcontractor.

In stark contrast, the issue here is whether Andrie suffered the economic burden of the sales tax and reimbursed its vendors for sales tax. (There is no dispute that Andrie exercised the requisite use, possession or control over the tangible personal property at issue sufficient to trigger use tax liability.) If Andrie had simply produced its receipts or invoices showing that it had paid sales tax, the parties would not be here. But Andrie has never provided any documentation showing that sales tax was "paid" on the subject property. Instead, the Court of Appeals relieved Andrie of this burden and *presumed* that sales tax had been paid. And as explained in the next section, there is no legal basis for such a presumption.

II. A retail purchaser is not entitled to a presumption that sales tax was paid on a retail transaction in Michigan.

Andrie persuaded the Court of Appeals that Andrie was entitled to rely on a *presumption* that sales tax had been included in the purchase price of items of personal property Andrie purchased from Michigan retailers. The only authority Andrie offered (and which the Court of Appeals did not cite) was MCL 205.73(1). But that provision has nothing to do with sales receipts or invoices; it is an advertising regulation that prohibits a retailer from publicizing that sales tax is not part of the price of tangible personal property the retailer sells.

> A person engaged in the business of selling tangible personal property at retail *shall not advertise or hold out to the public in any manner*, directly or indirectly, that the tax imposed under this act is not considered as an element in the price to the consumer. This act does not prohibit any taxpayer from reimbursing himself or herself by adding to the sale price any tax levied by this act. [MCL 205.73(1) (emphasis added).]

Thus, while a Michigan retailer could choose not to reimburse itself by collecting sales tax from its customers, MCL 205.73(1) would require the retailer to make it clear in its advertisements that the retailer was paying the sales tax on the transaction. Furniture stores and car dealers often do this.

What matters is that MCL 205.73(1) says nothing about a presumption that a retail purchaser (such as Andrie) paid sales tax when a retail sale occurred in Michigan. It is silent on that issue. Accordingly, under well-established Michigan law, it is the retail purchaser that must prove its entitlement to an exemption based on the fact that sales tax was actually "paid," MCL 205.94(1)(a).

Unlike a statute creating a tax, a statute granting a tax exemption or tax refund must be strictly construed against the taxpayer and in favor of the taxing authority. *Michigan Baptist Home & Development Co v Ann Arbor,* 396 Mich 660, 670; 242 NW2d 749 (1976); *Nomads Inc v City of Romulus,* 154 Mich App 46, 55; 397 NW2d 210 (1986). In *Elias Bros Restaurants Inc v Dep't of Treasury,* this Court said that "[b]ecause tax exemptions are disfavored; the burden of proving entitlement to an exemption rests on . . . the party asserting the right to the exemption." 452 Mich 144, 150; 549 NW2d 837 (1996) (referencing *Terchek v Dep't of Treasury,* 171 Mich App 508, 510-511; 431 NW2d 208 (1988)). Put another way:

> 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. [*Evanston YMCA Camp v State Tax Comm,* 369 Mich 1, 8; 118 NW2d 818 (1963), citing *Detroit v Detroit Commercial College,* 322 Mich 142, 148-149; 33 NW2d 737 (1948) (emphasis added)].

Consistent with the Legislature's decision to place the burden of proving entitlement to an exemption on the taxpayer, MCL 205.104a requires taxpayers to produce and retain tax records sufficient to support their claims:

> If the taxpayer fails to file a return or to maintain or preserve proper records as prescribed in this section, or the department has reason to believe that any records maintained or returns filed are inaccurate or incomplete and that additional taxes are due, *the department may assess the amount of the tax due from the taxpayer based on information that is available* or that may become available to the department. *That assessment shall be considered prima facie correct for the purpose of this act and the burden of proof refuting the assessment shall be upon the taxpayer.* [MCL 205.104a.[3]]

The taxpayer cannot transfer its own recordkeeping responsibility to the retailer from which it purchased the property, or to Treasury. This statutory requirement is consistent with Treasury's Administrative Rule 205.23, which requires a taxpayer

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[3] During the audit period, this language cited was codified in MCL 205.104. MCL 205.104 was repealed and replaced by MCL 205.104a.

to preserve suitable and adequate records to enable the taxpayer and the State to determine the correct amount of tax for which the taxpayer is liable.[4]

It is easy to see how this burden and recordkeeping requirement should work. If a taxpayer claimed a use-tax exemption for having paid sales tax in an out-of-state transaction, see MCL 205.94(1)(e), the taxpayer would have to produce a sales receipt or invoice proving that it did, in fact, pay sales tax. The same is true when a taxpayer claims the exemption for a Michigan transaction under MCL 205.94(1)(a). It is the consumer that holds the receipt showing whether sales tax was due and paid to the retailer; and it is the consumer's responsibility to either pay the use tax or prove entitlement to an exemption. MCL 205.97.

In sum, the Court of Appeals had it exactly backwards when it said that the consumer should not have the burden of proof because the retailer has the ultimate responsibility to pay the sales tax to the State. (Slip Op at 9, App 44a.) Quite the opposite, it is assumed that a Michigan company using or consuming tangible personal property in Michigan must pay a 6% use tax unless the company can prove that sales tax was "paid." MCL 205.94(1)(a).

Shifting the burden and requiring *Treasury* to verify that sales tax has been paid before imposing use tax is contrary to the tax code and Michigan tax jurisprudence. It also creates enormous practical problems. To begin, requiring

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[4] Treasury administrative rules interpret the tax statutes and have the force of law. *See, Danse Corporation v City of Madison Heights*, 466 Mich 175, 181; 644 NW2d 721 (2002). ("In order for an agency regulation, statement, standard, policy, ruling, or instruction of general applicability to have the force of law, it must fall under the definition of a properly promulgated rule.")

Treasury to obtain information from one taxpayer for use in an audit against another taxpayer could place Treasury's auditors at risk of violating the prohibition against divulging confidential information set forth in MCL 205.28(f).

In addition, Treasury lacks the resources to audit all of the third-company vendors that sell tangible personal property to a taxpayer. In the case of a large corporation, the number of tangible-personal-property transactions could number in the tens or hundreds of thousands.

A shifted burden also creates countless opportunities for tax avoidance behavior. For example, a retail purchaser could present a fraudulent non-profit sales tax exemption to a retailer at the time of purchase, not pay sales tax, and then avoid use tax on the basis that the purchase took place in Michigan and was *subject* to Michigan sales tax. (This may be the case even with scrupulous taxpayers that honestly, but erroneously, believe they are entitled to an exemption.) All of these problems are avoided simply by applying the plain, statutory language.

For all these reasons, the Court should reverse the Court of Appeals and hold that a consumer is not entitled to a presumption that sales tax is paid on retail transactions occurring in Michigan.

III. The use-tax exemption in MCL 205.94(1)(a) does not apply in this case.

Once the governing legal rubric is understood, its application to Andrie is logical and straightforward.

Andrie used and consumed tangible personal property in Michigan, subjecting Andrie to a 6% tax for that use. MCL 205.93(1). Andrie could not or would not provide documentation that it paid sales tax for the subject property; in fact, Andrie did not even *allege* that it paid sales tax on the in-State retail transactions by which it acquired the tangible personal property at issue. Accordingly, Andrie has not qualified for the exemption in MCL 205.94(1)(a). Because MCL 205.94(1)(a) is the only use-tax exemption at issue, Andrie is liable for the use tax that Treasury has assessed.

CONCLUSION AND RELIEF REQUESTED

The Court of Appeals erroneously rewrote the use-tax-exemption statute, converting an exemption based on sales tax "paid" to one based on sales tax "eligible." That result cannot be reconciled with the plain language of the Use Tax Act and the General Sales Tax Act, distinct taxing regimes that *both* apply when tangible personal property is first sold at retail and then used or consumed; with the use-tax exemption, MCL 205.94(1)(a), which requires a tax payer to show that sales tax was actually "paid" to establish a right to the exemption; or with the well-settled rule that taxpayers always bear the burden of proving their eligibility for an exemption.

Treasury cannot overstate the cataclysmic result that an affirmance will have on past and future use-tax collections. Accordingly, Treasury respectfully requests that the Court vacate Paragraph II.C of the Court of Appeals' April 26, 2012 opinion and hold that (1) a retail transaction in Michigan subject to the sales tax is exempt from the use tax *only* if the sales tax is actually "paid," MCL 205.94(1)(a); (2) it remains the consumer's burden to prove that sales tax has been paid to receive the benefit of MCL 205.94(1)(a)'s exemption; and (3) the MCL 205.94(1)(a) exemption does not apply in this case because Andrie has failed to prove that sales tax was

paid on the transactions at issue.

Respectfully submitted,

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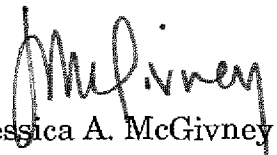

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