STATE OF MICHIGAN
IN THE SUPREME COURT

FRADCO, INC.,

Petitioner-Appellee,

v

Supreme Court No.146333

Court of Appeals No. 306617

Michigan Tax Tribunal No. 0409506

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

and

SMK, LLC,

Petitioner-Appellee,

v

Supreme Court No.146335

Court of Appeals No. 306639

Michigan Tax Tribunal No. 0409504

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellant.

AMICUS CURIAE BRIEF OF THE MICHIGAN ASSOCIATION OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF PETITIONER-APPELLEE FRADCO, INC. AND PETITIONER-APPELLEE SMK, LLC

Wayne D. Roberts (P62706)
Elisa J. Lintemuth (P74498)
DYKEMA GOSSETT PLLC
300 Ottawa Avenue, NW, Suite 700
Grand Rapids, MI 49503
(616) 776-7500

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STATEMENT OF INTEREST

The Michigan Association of Certified Public Accountants ("MACPA") is a professional organization that represents the interests of nearly 18,000 certified public accountants ("CPA") in Michigan. The diversity of the membership of the MACPA, and the of clients its members serve, assures that positions advocated by the MACPA represent objectively good policy for the benefit of Michigan businesses and society generally and not of any special interest.

MACPA members provide comprehensive tax and accounting services both as in-house tax officers and accountants, and as CPAs in private practice. MACPA members are required to satisfy rigorous educational requirements and must undertake annual continuing professional education coursework to ensure that they fully understand tax matters – in particular, evolving Michigan tax regulation – so they can assist businesses and individuals comply with Michigan tax laws and interpretation of Michigan tax notices. Businesses – both large and small – and individual taxpayers rely on MACPA members to interpret often-complex tax rules, provide advice regarding how different taxes apply to business activities and how to properly comply with the complex statutory scheme. In addition, taxpayers in Michigan rely heavily on their MACPA member advisors to help them respond to notices and inquiries received from taxing authorities, and protect their rights in connection with Michigan tax matters.

MACPA members and the businesses that rely on professional tax advisors are significantly impacted by Michigan tax law and the laws governing the interpretation and administration of that law. MACPA members work with the Michigan Department of Treasury (the "Department") on a regular basis and, unfortunately, can confirm that the Department's behavior in the two cases at bar is not isolated. As the taxpayers' briefs have described, the Department's behavior in these cases is striking. MACPA members have witnessed similar behavior in multiple cases involving small businesses, large businesses and individuals.

Behavior like the Department's intentional disregard for the notice requirements set forth in MCL 205.8 (the "Authorized Representative Notice" provision) has become the kind of standard Department policy that is now the rule rather than an exception to the rule. And this type of behavior has resulted in lost appeal rights and excessive assessments of tax, penalty and interest in many cases in which MACPA members were designated representatives under the Authorized Representative Notice law.

In contrast to the documented behavior underlying these cases, the behavior sought by the MACPA would lead to fair tax administration that provides certainty and stability. Certainty and stability in the administration and application of Michigan law, including all of the revenue taxes governed by the Michigan Revenue Act, are essential to CPAs, to businesses' effective business planning and operations, and to governmental actions related to due process, notice, and sound tax policy decision-making. The Court of Appeals' decisions in the two cases on appeal provide the kind of certainty and stability that is needed, offer results that are consistent with the plain language of the relevant statutory provisions, and reaffirm that the Department must comply with mandatory Michigan tax notice provisions. Although the Court of Appeals' decisions apply directly to two specific taxpayers, the decisions have a far-reaching impact on Michigan businesses, their MACPA member-advisors, basic principles of fundamental fairness and due process, and Michigan law that governs the administration of multiple tax acts.

These cases raise issues of great importance to the MACPA, its members, and to the State of Michigan and its citizens. For the MACPA, it is critical to provide input because the potential reversal of the well-reasoned decisions of the Court of Appeals would threaten to invalidate 1993 legislation intended to protect taxpayer rights (the "Taxpayer Rights Legislation")[1] that the MACPA fought for and supported, render the Authorized Representative Notice provision

[1] HB 4104 and HB 4160 of 1993.

enacted as a part of that Taxpayer Rights Legislation nugatory and without meaning, undermine fundamental due process and notice principles, unsettle business expectations and create uncertainty with regard to how MACPA members can – without any guarantee of notice – effectively advise or represent Michigan taxpayers in tax disputes.

For these reasons, as set forth in more detail herein, the MACPA asks this Court to affirm the Court of Appeals' decisions. Such a ruling from this Court would recognize the plain language of the Michigan Revenue Act, MCL 205.1 *et seq.* (the "Revenue Act") give effect to the clearly documented legislative intent underlying the Authorized Representative Notice law codified as MCL 205.8 and ensure that taxpayers and the MACPA-advisors on whom they rely are sent statutorily mandated notice of potential tax issues and disputes before appeal rights, which were provided to satisfy due process considerations, expire.

STATEMENT OF FACTS

The MACPA agrees with and adopts the Statement of Facts set forth in the briefs filed by Petitioner-Appellee Fradco, Inc. and Petitioner-Appellee SMK, LLC. As counsel for both taxpayers has indicated, the facts in each case are different. However, as the facts relate to the MACPA's interests, they are consistent. In each case, the record reflects the undisputed fact that the Department intentionally disregarded its obligations under MCL 205.8 and chose not to send copies of notices of final assessment to properly authorized power of attorney representatives until, in the Department's view, appeal rights had expired.

ARGUMENT

This appeal asks the Court to consider the due process rights of taxpayers who properly file a written request under MCL 205.8 that the Department send copies of all letters and notices to the taxpayer's official representative. Although the statute mandates that the Department "shall" send copies to the taxpayer's official representative, the Department argues that this

statutory obligation is merely a permissive courtesy-copy provision, and that the Department can evade the requirements of MCL 205.8 without consequence. Indeed, in both cases at bar, the Tax Tribunal determined that the taxes assessed were not legally due; however, the Department seeks to enforce these erroneous and incorrect assessments based on a purported procedural deficiency, whereby the Department claims that the assessments became final and unappealable 35 days after it sent notice to the taxpayer, despite the fact that it admits notice was not sent to the taxpayer's official representative of record.

I. THE COURT OF APPEALS CORRECTLY HELD THAT MCL 205.8 IS A PARALLEL NOTICE REQUIREMENT TO MCL 205.28(1) AND THAT THE DEADLINES TO APPEAL UNDER MCL 205.22 DO NOT BEGIN TO RUN UNTIL NOTICE IS SENT TO BOTH THE TAXPAYER AND ITS AUTHORIZED REPRESENTATIVE.

In both *SMK* and *Fradco*, the Court of Appeals provided a thorough statutory analysis of the relationship between MCL 205.8, MCL 205.22, and MCL 205.28. As the Court of Appeals framed the issue in both cases, "[t]he issue before us today is when the 35-day period under MCL 205.22(1) begins to run if the taxpayer has previously filed a written request with the Department of Treasury to send copies of all letters and notices to the taxpayer's representative." (Court of Appeals Opinions, p. 2.) "Because the sections at issue—MCL 205.8, MCL 205.22, and MCL 205.28—are part of [the same] act, the plain language of MCL 205.59(1) indicates that respondent [Department of Treasury] is required to follow all these sections." (*Fradco* Court of Appeals Opinion, p. 3; *SMK* Court of Appeals Opinion, p. 2.) "Respondent argues that the Legislature would have specifically referred to MCL 205.28 in MCL 205.8 if it had intended to elevate the level of notice required. Respondent's interpretation would require us to undermine the plain language of the statute on the basis of an impermissible guess at the Legislature's intent." (Court of Appeals Opinions, p. 3.) "In reading the provisions of MCL 205.8 and MCL 205.28(1) together, it is clear that these sections should be interpreted as imposing parallel notice

requirements whenever a taxpayer has a valid written request on file for respondent to send copies to an official representative. This interpretation gives meaning to both statutory sections' plain languages and produces 'an harmonious whole.'" (Court of Appeals Opinions, p. 4.) Therefore, the Court of Appeals "conclude[d] that MCL 205.8 must be interpreted in tandem with MCL 205.28(1) as creating parallel notice requirements. If a taxpayer has filed a proper written notice that designates an official representative, then respondent must give notice to both the taxpayer and the taxpayer's representative before the 35-day period under MCL 205.22(1) begins to run." (Court of Appeals Opinions, p. 4.) The Courts of Appeals' careful analysis is in conformity with the plain language, legislative intent, and good tax policy, and should be affirmed.

II. AFFIRMING BOTH DECISIONS OF THE COURT OF APPEALS WOULD ENFORCE THE PLAIN LANGUAGE OF MICHIGAN TAX STATUTES, REINFORCE LEGISLATIVE INTENT, AND PROVIDE CERTAINTY AND STABILITY THAT IS NEEDED FOR MICHIGAN TAX ADVISORS AND THEIR BUSINESS CLIENTS.

As this Court has stated, the primary purpose of statutory construction is to give effect to the Legislature's intent by first considering the plain language of the statute, enforcing the statute as written, and ensuring that the statute not be rendered nugatory:

> When reviewing matters of statutory construction, this Court's primary purpose is to discern and give effect to the Legislature's intent. *Turner v Auto Club Ins. Ass'n*, 448 Mich 22, 27, 528 NW2d 681 (1995). The first criterion in determining intent is the specific language of the statute. *DiBenedetto*, *supra* at 402, 605 NW2d 300. The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written. *Id.* Additionally, it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory. *Hoste v Shanty Creek Management, Inc*, 459 Mich 561, 574, 592 NW2d 360 (1999). Unless defined in the statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning. See MCL 8.3a. See also *Western Mich Univ Bd of Control v Michigan*, 455 Mich 531, 539, 565 NW2d 828 (1997).

Robertson v DaimlerChrysler Corp, 465 Mich 732, 748; 641 NW2d 567 (2002).

MCL 205.8 was enacted as a part of the 1993 Taxpayer Rights Legislation. This legislation was prompted by a movement aimed at protecting citizens from unreasonable, overbearing, and intimidating enforcement of the tax laws. House Legislative Analysis, House Bills 4104 and 4160 (February 23, 1993). Key to the Taxpayer Rights Legislation was the goal of ensuring that the revenue departments must "provide the public with the information needed to cooperate with the tax system." *Id.* The "information needed" by taxpayers includes appropriate notice to a designated representative. *Id.*, see also HB 4160. To implement the objectives underlying the Taxpayer Rights Legislation, the Michigan Legislature enacted MCL 205.8, which created a clear and unequivocal requirement that the Department **shall** send copies of notices and correspondence to both the taxpayer involved in a potential dispute, and the taxpayer's designated representative.[2] For more than twenty years, Michigan CPAs and the taxpayers they advise have attempted to rely on this enactment in their efforts to comply with Michigan tax law. CPAs and the Michigan taxpayers they advise require the certainty and consistency that was guaranteed by the 1993 Taxpayer Rights Legislation, including the separate statutory requirement that notice be provided to an authorized representative in a case that involves a potential tax dispute. The Michigan Court of Appeals correctly enforced the plain language of MCL 205.8, which recognizes these needs. Therefore, this Court should affirm the correct and well-reasoned decisions in favor of *SMK* and *Fradco*.

A. Under the Plain Language of MCL 205.8, the Department Was Required To Provide Notice To The Taxpayers' Representatives.

MACPA member are asked, sometimes on a daily basis, to apply Michigan tax law in assisting their clients to voluntarily comply with the Michigan tax system. Under the plain language of MCL 205.8, once an appropriate power of attorney form is filed with the

[2] H.B. 4160 resulted in 1993 Public Act 14, which was codified at MCL 205.8, immediately effective April 1, 1993.

Department directing the Department to provide notice to a designated representative, the Department must send letters and notices to the representative before the Revenue Act notice requirement is satisfied. This provision specifically provides:

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

MCL 205.8 (emphasis added). The mandatory nature of this notice requirement is made clear by the Legislature's use of the term "shall" in this statute. In Michigan legislation, the term "shall" means "must" and is a mandate; this is not a permissive statute enacted to simply "allow" the Department to take an action. See *Granger v Naegele Advertising Cos, Inc,* 46 Mich App 509; 208 NW2d 575 (1973).[3]

The Orders granting Leave to Appeal in the cases at issue raise as a separate issue the question whether the "tolling requirement" adopted by the Tax Tribunal and the Court of Appeals is contrary to the finality requirements of MCL 205.22(4) and (5).[4] This question is inextricably intertwined with the first question and requires the three statutes at issue, MCL 205.8, MCL 205.28, and MCL 205.22, to be reviewed together. In connection with this review, the statutory language of MCL 205.28 and MCL 205.22 need to be considered contemporaneous with the language of MCL 205.8, which is reproduced above. The additional statutory language at issue provides as follows:

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[3] The mandatory nature of MCL 205.8 is further supported by the legislative history. In particular, the Summary of House Bills 4104 and 4160 states that that HB 4160 would "***[r]equire*** that copies of letters and notices regarding a department-taxpayer dispute be sent to a taxpayer's official representative (in addition to the taxpayer) by the department upon request of the taxpayer." House Legislative Analysis Section Summary of House Bills 4104 and 4160, p.2 (emphasis added).

[4] Michigan Supreme Court Order Nos. 146333 & (44)(45) (March 27, 2013)(*Fradco*) & 146335 & (40)(41) (March 27, 2013)(*SMK*).

> Sec. 28. (1) The following conditions apply to all taxes administered under this act unless otherwise provided for in the specific tax statute:
>
> (a) Notice, if required, shall be given either by personal service or by certified mail addressed to the last known address of the taxpayer. Service upon the department may be made in the same manner.

MCL 205.28.

> Sec. 205.22. (1) A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 35 days, or to the court of claims within 90 days after the assessment, decision, or order. The uncontested portion of an assessment or decision shall be paid as a prerequisite to appeal.
>
> * * *
>
> (4) The assessment, decision, or order of the department, if not appealed in accordance with this section, is final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack.
>
> (5) An assessment is final, conclusive, and not subject to further challenge after 90 days after the issuance of the assessment, decision, or order of the department, and a person is not entitled to a refund of any tax, interest, or penalty paid pursuant to an assessment unless the aggrieved person has appealed the assessment in the manner provided by this section.

MCL 205.22. As both the Court of Appeals and the Taxpayers' counsel have explained, a basic and fundamental tenet of Michigan statutory construction rules requires statutes within the same Act to be interpreted in a manner such that potentially "[c]onflicting provisions of a statute must be read together to produce a harmonious whole and to reconcile any inconsistencies wherever possible." *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 416; 590 NW2d 293 (1999).

The historical chronology of the statutory language quoted above is important in evaluating the statutory construction principles applied to interpret the Revenue Act provisions at issue. First, in 1986, the finality provisions contained in MCL 205.22 were enacted and have been a part of the Revenue Act since that time.[5] They have been moved slightly over time, but

[5] H.B. 4706 resulted in 1986 Public Act 58, which was codified in part at MCL 205.22, effective May 1, 1986.

have remained basically unchanged since enactment. At the same time, in 1986, the notice provisions of MCL 205.28 were enacted.[6] Then, between 1986 and 1993, based on perceived abuses and the need for taxpayer representatives to receive notice of tax disputes and assessments, a taxpayer rights initiative gained momentum and resulted in the Taxpayer Rights Legislation of 1993, which created the new notice requirement contained in MCL 205.8. Under Michigan law, this chronology is important because the legislature is presumed to have knowledge of existing law when it enacts or amends a statute. See *Lenawee County Gas & Electric Co v City of Adrian*, 209 Mich 52, 64; 176 NW 590 (1920) ("Laws are assumed to be enacted by the legislative body with some knowledge of, and regard to, existing laws upon the same subject and decisions by the court of last resort in reference to them."); *Skidmore v Czapiga*, 82 Mich App 689, 691; 267 NW2d 150 (1978) ("[T]he Legislature when enacting or amending a statute must be presumed to have knowledge of existing statutes and laws.").

The 1993 Legislature therefore had knowledge of the taxpayer notice requirements contained in MCL 205.28 and added MCL 205.8 to supplement those requirements. There was no more of a need to reference other Revenue Act sections in 1993 than there was in 1986 when the original taxpayer notice requirement was enacted (which also did not reference MCL 205.22). Under basic principles of statutory construction, there is only one interpretation of these three provisions that allows for a harmonious whole and affords meaning to each statute, and that is the interpretation adopted by the Court of Appeals when it held that MCL 205.8 and MCL 205.28 serve as "parallel notice requirements" that both must be satisfied before the statutory deadlines and finality provisions of MCL 205.22 are triggered. (Court of Appeals Opinions, p. 4.) Because the Department intentionally disregarded the requirements of MCL 205.8, the statutory deadlines and finality provisions of MCL 205.22 were never triggered, and

[6] H.B. 4706 resulted in 1986 Public Act 58, which was codified in part at MCL 205.28, effective May 1, 1986.

there was no "tolling" (*i.e.*, suspending or delaying)[7] of the appeal deadlines; therefore, the Court's second certified question is dependent upon, and cannot be separated from, the first certified question. In other words, because the 35 day period under MCL 205.22(1) never began to run (because the Department did not provide notice of the assessment to the taxpayer's official representative as required by MCL 205.8), the assessment did not become final and unappealable under MCL 205.22(4) and (5).

One additional principle of statutory construction applies to these cases and must be considered in this analysis. That is the general and overriding principle that, under Michigan law, any ambiguity or inconsistency in a taxing statute must be strictly construed in favor of the taxpayer and against the government. It is well-established that an unambiguous statute must be interpreted according to its plain language. *Breighner v Mich High Sch Ath Ass'n*, 471 Mich 217, 236; 683 NW2d 639 (2004) (*citing Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992)). It is also an established rule in Michigan that courts are not to "extend [taxing statutes] beyond the clear import of the language used . . . In case of doubt they are construed most strongly against the government and in favor of the citizen." *Hart v Dep't of Revenue*, 333 Mich 248, 252; 52 NW2d 685 (1952), *quoting Gould v Gould*, 245 US 151, 153; 38 S Ct 53; 62 L Ed 211 (1917). The plain language of MCL 205.8 unmistakably ***requires*** the Department to send a copy of the notice of final assessment to the taxpayers' authorized representatives before a taxpayer is denied any right to appeal or other due process. And if there is any doubt or potential conflict, such a doubt or conflict must be resolved in favor of the taxpayer and against the government, which in this case is seeking to collect taxes that

[7] Black's Law Dictionary defines "Toll" as follows: "(Of a time period, esp. a statutory one) to stop the running of; to abate <toll the limitations period>." TOLL, Black's Law Dictionary (9th ed. 2009). Here, the limitations period under MCL 205.22(1) did not start until the Department complied with both parallel notice requirements, and therefore, was not tolled.

undisputedly are not owed under the applicable law. This analysis of basic Michigan tax principles supports the Court of Appeals' decisions requiring that notice be sent under MCL 205.8 before a taxpayer can be deprived of all due process and property (*i.e.*, tax dollars).

B. The Court of Appeals Decisions in *Fradco* and *SMK* Reinforce the Legislative Intent Underlying the Enactment of the Authorized Representative Provisions of the 2003 Michigan Taxpayer Rights Legislation.

The Authorized Representative provisions of the 1993 Taxpayer Rights Legislation, which were codified as MCL 205.8, were enacted as a part of a movement intended to improve the relationship between taxpayers and tax administrators. See House Legislative Analysis of Taxpayer Rights; House Bill 4104 as introduced and House Bill 4160 as introduced (First Analysis February 23, 1993;); See also, House Legislative Analysis of Taxpayer Rights, House Bill 4104, as enrolled and House Bill 4160, as enrolled (September 10, 1993). The stated, undisputed motivation underlying the enactment of this legislation included a recognition that "voluntary compliance requires that taxpayers have respect for and confidence in the tax system. Taxpayers need to perceive their treatment by tax collectors as fair and need to believe that they are on 'a level playing field' when involved in disputes with government over tax liabilities . . . . Tax administrators need to treat the public consistently, fairly, courteously, and competently. And they must provide the public with the information needed to cooperate with the tax system." *Id.* To accomplish these objectives, including the objective of ensuring that taxpayers had adequate information and notice of potential tax disputes, the Legislature enacted HB 4160, which provided a clear and plain intention to "[r]equire that copies of letters and notices regarding a department-taxpayer dispute be sent to a taxpayer's official representative (in addition to the taxpayer) by the department upon the request of the taxpayer. *Id.*

The conclusion that a notice is "issued" when it is "sent" for purposes of MCL 205.22 and Michigan notice requirements is supported by both Michigan case law and basic principles

of notice and logic. As the Court of Appeals stated in *PIC Maintenance, Inc v Dep't of Treasury*, 293 Mich App 403; 809 NW2d 669 (2011), "respondent complied with the statute and ***sent*** the final assessments to petitioner by certified mail. Petitioner than had 35 days to appeal." *PIC Maintenance*, 293 Mich App at 403 (emphasis added). In this decision, the Court of Appeals therefore recognized that an assessment must actually be "sent" before it can constitute adequate notice, and the 35-day period under MCL 205.22 begins to accrue. Moreover, this conclusion is consistent with general notice considerations and basic logic. A notice must be sent before it can be considered issued for notice purposes because a notice simply cannot be reasonably designed to reach a party if it is never sent. It is undisputed that, while a notice may not need to be actually received to constitute adequate notice, *Bickler v Dep't of Treasury,* 180 Mich App 205; 446 NW2d 644 (1989), it must be "reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, citing *Mullone v Central Hanover Bank & Trust*, 339 US 306, 314; 70 S Ct 652; 94 LEd 865 (1950). The Department's intentional disregard for the mandatory notice required by MCL 205.8 plainly fails under this notice test, because, under the circumstances, the Department's actions appear to have been designed to ensure that interested parties (i.e., the authorized representative CPA) were **not** apprised of the pendency of the action and afforded an opportunity to present objections -- exactly the opposite of well-established notice obligations.

The MACPA and its CPA members worked diligently with the Legislature in connection with the enactment of the 1993 Michigan Taxpayers' Rights Legislation and, in particular, worked for the authorized representative notice provisions contained in HB 4160, which are codified as MCL 205.8. The MACPA was involved in this legislative effort and its

understanding that MCL 205.8 was intended to serve as a parallel notice requirement is consistent with the plain language of the statute and the documented legislative history. MACPA members recognize that any allegation that a conflict exists between MCL 205.8 and the finality provisions contained in MCL 205.22, which was in existence and understood fully at the time MCL 205.8 notice requirement was enacted, is misplaced and disingenuous at best. The Department erroneously argues that "[i]f the Legislature desired the limitations trigger to be based on a notice to a third party, it would have said so in MCL 205.22 or, at the very least, in MCL 205.28(1)(a)."[8] However, nothing in 205.22 ties the appeal deadlines to a specific notice requirement in MCL 205.28 or any other notice provision. Therefore, with no specific reference to notice, should this Court presume that notice is not required at all? Of course not. The Department's simplistic and opportunistic "analysis" attempts to treat notice as purely a statutory matter.

MCL 205.22 says nothing about how notice must be provided under MCL 205.28. MCL 205.28(1) simply provides that notice must be provided to a taxpayer by mailing to the taxpayer's last known address. MCL 205.22 also says nothing about how notice must be provided under MCL 205.8. In fact, such a reference would be an anomaly because MCL 205.8 was added in 1993, approximately seven years after the enactment of MCL 205.22, as a supplemental taxpayer protection to ensure that, in cases in which a taxpayer formally authorized a representative, such as a CPA, to represent it in a tax dispute, notice would not be complete until the authorized representative was also served with the notice or correspondence. This Court must interpret MCL 205.8 in a manner that is in harmony with both MCL 205.22 and MCL 205.28, and there is only way to read these two notice provisions together without rendering the taxpayer protections of MCL 205.8 meaningless. See *Hoste v Shanty Creek Mgmt,*

[8] Brief on Appeal of Appellant Michigan Department of Treasury, Pg. 8.

Inc, 459 Mich 561, 574; 592 NW2d 360 (1999) (holding that this Court must construe a statute in a manner that does not ignore, render nugatory, or treat as surplusage specific words in legislation). That is to hold, as the Michigan Court of Appeals did in both cases at issue, that the Department must send notices to both the taxpayer and its authorized representative before the Revenue act notice requirements are satisfied. The Department can easily comply with this holding, which simply means that the statutory appeal deadlines do not begin to run until both notice requirements are met, by mailing or faxing a copy of the notice to the taxpayer's representative at the same time it sends the notice to the taxpayer. If notice is complete under MCL 205.22 when a notice is sent only to an admittedly represented taxpayer, as the Department argues, then MCL 205.8 has no meaning or import, and its enactment was an impotent effort resulting in a meaningless and superfluous statute. The undisputed, documented legislative intent, plain language of the statutes involved, and basic tenets of statutory construction require this Court to interpret MCL 205.8 in a manner that it not be rendered nugatory and meaningless.

C. MACPA Members and the Businesses They Represent Rely on Consistency and Must Be Able to Rely on Michigan Law Requiring Tax Notices to Be Sent to an Authorized Representative.

MACPA members regularly represent Michigan taxpayers in connection with tax disputes with the Department and prepare and submit Department-authorized power of attorney ("POA") forms to facilitate this representation. Under Michigan law, MCL 205.8, an executed POA form ensures that a taxpayers' authorized representative shall receive all correspondence and notices, which ensures that Michigan businesses and their authorized CPA representatives will receive notices and information in a timely manner such that they can adequately understand, apply and comply with Michigan law.

1. *Adequate Notice to an Authorized Representative, as Statutorily Guaranteed by MCL 205.8, is at the Core of Michigan's Tax System and the Tax Representation Role of MACPA Members.*

Receiving adequate notice is at the heart of the CPA's role in representing his or her Michigan taxpayer client. If the Department is allowed to intentionally disregard the notice requirements of MCL 205.8 and proceed to a final, uncontestable tax assessment without providing statutory required notice to an authorized representative, then Due Process would not exist, the Michigan tax system would be undermined, and the enactment of the 1993 Taxpayer Rights Legislation would be rendered meaningless. Alleged taxpayer "rights" without adequate notice are no rights at all, and a decision overturning the two, well-reasoned decisions of the Court of Appeals in these cases would undermine Michigan's voluntary tax systems, the Michigan business climate and the role of CPAs in Michigan business and tax practice. CPAs would be left with a very restricted and uncertain ability to conduct their business and would never be able to be certain – regardless of how many times they try to contact the Department to inquire – whether a notice has been issued to a client for which they have a valid POA on file. Businesses, along with potential business investors, would not have confidence in the Michigan tax system and none of the stated, undisputed objectives of the 1993 Taxpayers Rights Legislation would have been achieved. Despite the tax simplification and tax reform advances that Michigan has made in the past few years, this one procedural issue, which would result in an effective denial of notice, threatens to return Michigan to its pre-reform status as a state that is unfriendly to business; and this single issue threatens to undermine the tax representation role of CPA members of the MACPA.

2. *Adequate Notice to an Authorized Representative Forms the Foundation of a Fundamentally Fair Tax System and, Based on General Tax Statutory Construction Principles, Is Required by Due Process Considerations, and Facilitates the Collection and Payment of the Correct Amount of Tax.*

MACPA members are called upon every day to advise clients regarding Michigan taxation. In this role, they rely on the validity of binding legal precedent and the certainty that is afforded by a presumption that Michigan tax law will be administered and interpreted fairly and consistently in a manner that reflects fundamental fairness, respect for due process and in conformity with principles of good tax policy.[9]

3. *Following the Enactment of MCL 205.8, Taxpayers Are – And Should Be – Able to Rely on Their Duly Authorized Tax Advisors.*

Taxpayers in Michigan have been faced with multiple business taxes, and retroactive tax legislation designed to deny refunds to which they otherwise were entitled. In this dynamic and unreliable environment, there must be – at the very least – some guarantee that the taxpayer will not be denied statutory notice, due process, and appeal rights through slight-of-hand administrative efforts.

Michigan taxpayers attempt to fulfill their tax compliance efforts by retaining MACPA member CPAs. Even highly educated business owners and executives often find themselves lost in navigating tax issues, and therefore turn to the expertise of MACPA member CPAs to direct and advise them in tax matters. Accordingly, these taxpayers direct the Department to send copies of all letters and notices to their CPAs, to ensure that tax-related notices are properly addressed. By relying on professional tax advice from a CPA, such taxpayers can – and should be able to – rest easy, knowing that their tax obligations are being satisfied. Moreover, these

[9] One key principle of good tax policy is that there should be "certainty" in the law. Certainty requires that the tax rules clearly specify when the tax is to be paid, how it is to be paid, and how the amount to be paid is to be determined. *See* American Institute of Certified Public Accountants Tax Policy Concept Statement No 1, "Guiding Principles of Good Tax Policy: A Framework for Evaluating Tax Proposals" (March 2001).

taxpayers' appeal rights and due process rights are – and should be – protected because notice of any dispute or tax assessment must be sent to a designated representative before such a dispute or tax assessment can become final.

4. *The Statutory Mandate Requiring Notices Be Provided to an Authorized Representative Are Not Merely a Permissive Confidentiality Exception that Allows a Courtesy Copy.*

The statutory mandate contained in MCL 205.8 is plain and unambiguous: "The Department . . . ***shall*** send all notices to the designated representative." (emphasis added). If MCL 205.8 were intended to be anything less than a mandatory notice requirement, the Legislature would have made that clear by using the word "may" rather than "shall." Although the Department would like this Court to believe otherwise, the Legislature knows the difference between "may" and "shall," and did not select the language of the statute without reason. The Legislature is more than capable of crafting exceptions to confidentiality provisions in order to allow for courtesy copies by enacting permissive amendments by simply providing that the Department "may" take a designated action. However, the Legislature in 1993 specifically chose not to do this because, as confirmed in the Legislative History that was discussed at length and included with the taxpayers' briefs, MCL 205.8 was enacted to "require" notice to be sent to an "authorized representative (in addition to the taxpayer)." The statute and its Legislative History could not be more clear: MCL 205.8 is a parallel notice requirement that must be satisfied before the statutory appeal periods set forth in MCL 205.27 begin to run. The argument that a Taxpayer Rights enactment should be dismissed as a permissive, courtesy copy authorization is nearly as offensive to the basic concepts of fundamental fairness and due process as the Department's documented behavior in these cases.

If 205.8 notice requirements are mere suggestions to provide courtesy copies, then notice and due process in Michigan are illusory. Michigan taxpayers and the tax advisors on which

they depend need to have certainty that the law will be respected by the government and that they will be provided with notice that satisfies fundamental fairness and due process principles. Notice that is sent only to a taxpayer who is represented by a tax professional – with a correctly filed power of attorney – is not notice that satisfies such basic principles. Moreover, any intentional disregard for the basic notice requirements of MCL 205.8 represents a breach of the government's fiduciary duty to taxpayers that merits sanctions being levied against the Department.

The Department's unsupported assertion that the Taxpayer Rights Legislation created only a discretionary, permissive, courtesy copy ability is erroneous and reflective of deeper problems with current tax administration policies.

5. *As a Governmental Entity, the Department of Treasury Is – And Certainly Should Be - Mandated to Collect the Correct Amount of Tax Due Under the Law.*

The Michigan Department of Treasury is a division of the Michigan Executive Branch of State Government that has been delegated the duties of enforcing and administering Michigan's Tax Acts pursuant to the Michigan Revenue Act, MCL 205.1 *et seq*. See also MCL 205.13; MCL 205.35. In connection with these duties, the Department has been authorized to "collect state taxes . . . as may be designated by law." MCL 205.35 (codifying Executive Reorganization Order 1991-16). See also MCL 205.13(1)(e) (the Department is only authorized to collect those amounts that are "owing") The Department, as a part of the Executive Branch of government, acts as a public servant and as a representative of Michigan's State Government – a democratic form of government that is "by the people, for the people" that was not formed to engage in tyranny or unwarranted seizures from its citizens. As a tax administration agency, the Department takes on a role in Michigan that is similar to the role the Internal Revenue Service (the "Service") fulfills with regard to the collection of federal taxes for the United States

government; like the Service, the Department's primary goal should be to collect the correct and verifiable amount of tax due under the law. See *Lyons Trading, LLC v US*, No. 3:07-mc-13, 2008 WL 361533 (ED Tenn Feb 8, 2008) (noting that "the IRS is charged to ensure that taxpayers pay the correct amount of tax" (citing 26 USC § 6201(a)); 26 USC 6203; Internal Revenue Manual ("IRM") 5.10.1 *et seq.*[10]

Consistent with the Department's obligation to collect the correct amount of taxes due under the law, MACPA members advise clients regarding how best to comply with their Michigan tax obligations and pay the correct amounts of taxes that are due under Michigan's tax laws, which are self-reporting, voluntary systems. MACPA members also assist clients with audits, and with defending against tax assessments that are inconsistent with the law to ensure that no more than the correct amount of tax due under the law is paid. MACPA members provide these services in good faith pursuant to ethical standards and a code of conduct that is mandated by professional regulators.[11] Many businesses, both small and large, and individuals place full reliance on their CPA representatives to protect their rights and to ensure that the taxes they pay are the correct amounts due under the law – and no more. If the Department consciously refuses to provide statutorily required notice to a CPA who is a properly authorized representative, then the only parties acting in good faith in an effort to ensure that the correct amount of tax is being paid are taxpayers and their representatives; the government will have abandoned its role as a public servant, exceeded its authorized purpose, and become a revenue-maximizing tax collector that is willing to engage in questionable behavior to collect taxes that admittedly are not due under the applicable law. That is exactly what would occur in both *SMK* and *Fradco* if the Court of Appeals rulings were to be reversed in these cases.

[10] Likewise, Michigan law requires the Department to issue a refund when it collects an excessive amount of tax. MCL 205.30.

[11] *See, e.g.*, APCPA Code of Professional Conduct and Bylaws (June 1, 2012).

It is undisputed that both of the underlying tax assessments in *SMK* and *Fradco* are erroneous and that no additional taxes are due under the applicable tax law and, as such, there should be no taxes due and to be collected. There are no taxes subject to collection under the substantive tax law and no taxes properly in dispute. However, inconsistent with any representation of a good faith effort to collect the correct amount of tax due, the Department has pursued tax collection efforts all the way through the Michigan Supreme Court in an effort to collect taxes that admittedly are not due based solely on wrong-minded procedural arguments. This is wrong and violates the basic principles that underlie a democratic form of government, including fundamental fairness and due process.

This Court should take this opportunity to remind the Department that its role, as a component of the Executive Branch charged with tax administration and collection duties, is to collect the correct amount of tax due under the law. It is not the Department's role to intentionally disregard mandatory Authorized Representative Notice requirements in an effort to deny taxpayers the appeal rights that form the foundation for due process in Michigan tax matters. MACPA members that are designated representatives pursuant to Michigan law can understand tax notices and know how to perfect appeal rights if a notice is incorrect. This is why MCL 205.8 was enacted in 1993 to supplement the existing, but inadequate notice provision contained in MCL 205.28. And this is why the Court of Appeals correctly harmonized the Revenue Act statutes at issue in this case and recognized that the statutory appeal periods do not begin to run until the Department has discharged its notice obligations in full – including sending a notice to the Authorized Representative if one has been properly designated.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated above, the MACPA asks this Court to enforce the plain language of MCL 205.8 and thereby affirm the Court of Appeals' decisions in both *SMK* and *Fradco*.

Respectfully submitted,
DYKEMA GOSSETT PLLC

By: Wayne D Roberts

Wayne D. Roberts (P62706)
Elisa J. Lintemuth (P74498)
DYKEMA GOSSETT PLLC
300 Ottawa Avenue, N.W., Suite 700
Grand Rapids, MI 49503
(616) 776-7500

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