STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
WHITBECK, P.J., FITZGERALD, J. AND BECKERING, J.

FORD MOTOR CO.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY

Dependent-Appellee.
_____/

Supreme Court No. 146962

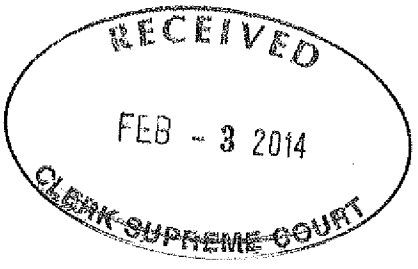
Court of Appeals No. 306820

Court of Claims No. 06-000182-MT

AMICUS CURIAE BRIEF OF

THE TAXATION SECTION

OF THE STATE BAR OF MICHIGAN



TAXATION SECTION, STATE
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STATEMENT OF INTERESTS OF AMICUS CURIAE

The Section of Taxation of the State Bar of Michigan (hereinafter the "Section") submits this brief as *amicus curiae* at the request of the Michigan Supreme Court.

The Section is a recognized division of the State Bar of Michigan, and with over 1,100 members, is the leading organization of legal tax professionals in the State of Michigan. The Section is comprised of lawyers with diverse backgrounds, and includes attorneys in private practice, in-house counsel, nonprofit organizations, government agencies, members of the judiciary, the legislature, and academia. Members of the Section represent individual taxpayers and all forms of business enterprises, as well as estates and trusts, engaged in a wide range of business and non-business activities.

The Section is dedicated to promoting uniform and equitable enforcement of tax laws with a goal to reduce the costs and burdens of tax administration and compliance. The Section furthers its mission by educating the legal community and the general public regarding taxpayer protections and by advocating for judicial and policy decisions on tax law that promotes principled tax policy.

An important role of the Section is to represent and protect the interests of the public by filing briefs *amicus curiae* in cases involving tax issues of great import to the State of Michigan. Such is the case here, where a cursory statute, coupled with a lack of regulations or guidance, caused both the taxpayer and the state to expend significant costs and time to determine when the Department of Treasury received adequate notice of a taxpayer's claim for refund.

The Department of Treasury's actions implicate not only constitutional principles of due process, but also basic tax policy principles of fundamental fairness. The Section has an interest in safeguarding the constitutional and statutory rights of Michigan taxpayers. Resolving this case

requires an appreciation of the practical context in which taxpayers and the Department of Revenue regularly communicate regarding matters of tax administration and controversy practice. The Section's experience with these processes gives the Section a unique perspective and aligns with the Section's goal to promote the efficient administration of tax law and policy. [1]

[1] After reasonable investigation, the Tax Council believes that (a) no Tax Council member who voted either in favor or against preparation of this brief, and no attorney in the law firm or corporation of such a Tax Council member, represents a party to this litigation; (b) no Tax Council member who represents any party to this litigation participated in the authorship of this brief, and (c) no one other than the Section, or its members who authored this brief and their law firms or employers, made a direct or indirect contribution, financial or otherwise, to the preparation or submission of this brief. The Section acknowledges and thanks the following individuals for their assistance in preparation of this brief: Evan H. Kaploe (Chair, Practice and Procedure Committee, Taxation Section, State Bar of Michigan).

QUESTIONS PRESENTED FOR REVIEW

1. Whether plaintiff-taxpayer's response to defendant Department of Treasury's August 3, 2005 audit determination letter – in light of events and communications that preceded that response, including information to the defendant by the plaintiff and the contents of the defendant's Audit Report of Findings – was a "petition ... for refund" or "claim for refund" for purposes of the calculation of overpayment interest under MCL 205.30?

   Plaintiff-Appellant Answers: Yes.

   Defendant-Appellee Answers: No.

   Amicus Curiae Answers: No.

2. Alternatively, whether the plaintiff's November 17, 2005 request for an informal conference with the defendant, in spite of its later withdrawal of that request, was such a petition or claim?

   Plaintiff-Appellant Answers: Yes.

   Defendant-Appellee Answers: No.

   Amicus Curiae Answers: No.

I. INTRODUCTION

At the invitation of this Court, the Section files this brief in connection with *Ford Motor Company v Michigan Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___; lv granted Docket No. 146962. The questions presented by the Court focus on specific dates in the procedural history of this matter to determine when Ford Motor Company (hereinafter "Ford") made a petition or claim for refund, that was sufficient to provide the Department of Treasury (hereinafter "Department") with adequate notice of its claim for refund. This date is pertinent, as it sets the date from which the 45 day period prior to the accrual of statutory interest begins to run on the amounts demanded to be refunded.

To resolve these questions, we must first consider the statutory requirement to effectuate a "claim" or "petition" for refund. The Section believes that the provisions of the General Revenue Act MCL 25.1 *et. seq.* lack clarity regarding what constitutes a claim or petition for refund. Irrespective of that ambiguity, general legal principles require a petition or claim for refund in which the Department must be put on notice that a taxpayer had made a claim or demand for a refund. Here, the claim is for a refund of interest on an overpayment of tax.

Case law makes it clear that in order to properly claim or petition the Department for a refund, the taxpayer must give the Department "adequate notice." See e.g. *Lindsay Anderson Sagar Trust v Dep't of Treasury*, 204 Mich App 128, 132; 514 NW2d 514 (1994). The parties to this case agree. As discussed *infra*, adequate notice occurs when a party is fairly apprised of the claim against him and is given the opportunity to post objections. Adequate notice is the key to what constitutes a claim for refund. The question is on what date the Department received adequate notice that Ford sought a refund. Interest begins to accrue 45 days after such date. MCL 205.30(3). The Section posits that the Department received adequate notice of Ford's claim for refund when Ford indicated it had made a payment under protest within the requirements of MCL 205.22, which

occurred on August 25, 2006. The accrual of interest began 45 days after that date, on October 9, 2006.

II. STATEMENT OF FACTS

The Section refers this Court to the Statement of Facts and Procedural History in the Brief of Plaintiff-Appellant Ford. Both Ford and the Department agree that a "petition" or "claim" for refund requires that the taxpayer gives the Department adequate notice that it is seeking a refund. [See Treasury's Br in Opp to App for Leave to Appeal at 2.] As noted in Ford's brief, the facts relevant to our analysis center on when Ford provided adequate notice to the Department.

We summarize the pertinent dates as follows. On August 3, 2005, the Department completed its audit and made its findings; it issued an Audit Determination Letter ("Audit Letter") to Ford. [Appellee's Br., App. 5-B, pp 99a-102a, Tab A]. The Audit Letter asked Ford to indicate whether it "agrees" or "disagrees" with this determination.

On August 3, 2005, Ford's representative marked an "x" on the line, to indicate that Ford disagreed with the determination. On August 12, 2005, Ford notified the Department via a letter that confirmed Ford's disagreement with the Audit Letter. The letter did not specifically request a refund of amounts on account that had been applied by the Department to the amounts determined to be due by the Audit Letter.

On September 19, 2005, the Department rejected Ford's argument, detailed the reason for the rejection, and notified Ford of its right to seek a legal remedy if it disagreed with the Department's findings. [Appellant's Br., App. 6, pp 194a-195a, September 19, 2005, letter from the Department to Ford]. Rather than having previously made estimated payments refunded, Ford left the funds with the Department on account. [Appellant's Br. p 7]. Thus, by Ford's own admission, the amounts were "on account" and it is not clear if such amounts had yet been applied to any tax due, thereby creating an opportunity to claim a refund.

On November 17, 2005, Ford served the Department with a request for an informal conference. The request informed the Department that Ford disagreed with all the adjustments that gave rise to the additional tax and deficiency interest. The request for informal conference further stated "The taxpayer will be working with the Department's audit team to narrow the issue of dispute, in the meantime, please contact me if you have any questions." No demand or claim for refund, or similar language, was indicated on the face of the request for an informal conference. [Appellant's Br., App. 5-B, pp 146a-150a, Tab K].

On August 25, 2006, Ford notified the Department that it was withdrawing its informal conference request. The letter stated in relevant part "it is our (Ford's) intention to withdraw our case from Informal Conference and file an action in the Court of Claims on the unresolved issues" and "Therefore, we are requesting that the audit deficiency, together with the applicable interest, be satisfied with the amounts currently being held by the Department "on deposit."" "The application of the amounts on deposit to the audit deficiencies should be viewed as a payment under protest within the meaning of MCL 205.22." [Appellant's Br., App. 5-B, pp 129a-131a, Tab D] [emphasis added].

On September 19, 2006, Ford also wrote to the informal conference division to withdraw its request. [Appellant's Br., App. 27, pp 371a-372a]. In response to the August 25, 2006 letter, the Department issued a Final Audit Determination Letter ("Final Audit Letter"), on September 15, 2006. [Appellant's Br., App. 5-B, p 117a, Attachment 3 to Tab C].

On December 13, 2006, Ford filed suit in the Court of Claims requesting a refund of the tax and deficiency interest paid for the VEBA audit adjustment, plus overpayment interest. [Appellant's Br. App. 5-A].[2]

A simple timeline illustrates these dates:

August 3, 2005 – Department issued the Audit Determination Letter

August 3, 2005 – Ford noted disagreement with Audit Determination Letter

August 12, 2005 – Ford letter detailing its basis for disagreeing with Audit Determination Letter

November 17, 2005 – Ford requested Informal Conference

August 25, 2006 – Ford withdrew request for Informal Conference and applied amounts on account to assessment as a payment under protest pursuant to MCL 205.22

September 15, 2006 – Department issued Final Audit Determination

December 12, 2006 – Ford filed an action in Court of Claims

The two dates this Court asked the Section to address are August 3, 2005 (when Ford marked an "x" on the line that denoted its disagreement with the Audit Determination Letter), and November 17, 2005 (when Ford requested its informal conference). The Court inquires if on either of these dates Ford gave the Department adequate notice of its claim for refund. The Section suggests that potentially neither of those dates qualifies, as both dates occurred prior to a demand that the taxes paid should be refunded. Rather, the Section respectfully submits to this Court that proper date of when Ford gave the Department adequate notice of its claim for refund occurred

[2] The Court of Claims held for the Department on the substantive tax issue. Ford appealed the decision to the Court of Appeals, which reversed the decision. The Court of Appeals remanded the case to the Court of Claims for further proceedings solely on the substantive tax issue.

when Ford applied its "amounts on deposit" to the purported tax due under protest and within the auspices of MCL 205.22. Such date was August 25, 2006.

III. ARGUMENT

A. The Framework of Statutory Interpretation Requires Any Doubt Regarding the Interpretation of MCL 205.30 To Be Resolved in Favor of The Taxpayer.

The courts are to effect the intent of the Legislature. *People v Wager*, 460 Mich 118, 123, n 7; 594 NW2d 487 (1999). The beginning point of determining intent begins with an examination of the language of the statute. *Wikens v Oakwood Healthcare Systems*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear and unambiguous, the statute is enforced as written. *People v Stone* 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial Inc v Shacks Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

It is well-settled that tax statutes are strictly construed in favor of the taxpayer and against the taxing authority:

> Tax exactions, property or excise, must rest upon the legislative enactment, and collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express authority so that it may be read when it is questioned in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer. [*In re Dodge Bros*, 241 Mich 665, 669; 217 NW 777 (1928)][emphasis added].

If a tax statute has a doubtful meaning, it must be liberally construed in favor of the taxpayer and against the State. *City of Ann Arbor v Nat'l Center for Manufacturing Services Inc*, 204 Mich App 303; 514 NW2d 224 (1994). As a general rule, tax laws are construed against the government. *Andrie, Inc v Dep't of Treasury*, 296 Mich App 355, 365; 819 NW2d 920 (2012).

Therefore, courts should apply tax statutes in favor of the taxpayer. Specifically, "when ambiguities exist, tax laws are generally construed in favor of the taxpayer." *Lear Corporation v Dep't of Treasury*, 299 Mich App 533, 537; 831 NW2d 255 (2013). Moreover, "[w]here a tax statute is the object of judicial construction, ambiguities in the language are to be resolved in favor of the taxpayer, however, tax statutes that grant tax credits or exemptions are to be narrowly construed in favor of the taxing authority because such statutes reduce the amount of tax imposed." *Alliance Obstetrics & Gynecology v Dep't of Treasury*, 285 Mich App 284, 286; 776 NW2d 160 (2009).

1. MCL 205.30 Does Not Clearly And Adequately Define What Constitutes a Claim For Refund And The Department Has Failed to Provide Adequate Guidance to Taxpayers.

Michigan law fails to clearly define what constitutes a claim for refund to the Department of Treasury. MCL 205.30 states, in relevant part:

> A taxpayer who paid a tax the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified as the statute of limitations in section 27a. If a tax return reflects an overpayment or credits in excess of the tax, the declaration of that fact on the return constitutes a refund.... MCL 205.30(2)] [emphasis added].

Thus, it is clear that if a return reflects an overpayment or credits in excess of the tax due, that declaration alone will constitute a refund. If a return is not the method in which a declaration is made, and a taxpayer wishes to pursue an appeal to the Court of Claims, MCL 203.22 provides that:

> In an appeal to the court of claims, the appellant shall first pay the tax, including any applicable penalties and interest, under protest and claim a refund as part of the appeal. [MCL 205.22(2)].

This statutory provision outlines the procedure for claiming a refund when pursuing an appeal, but fails to adequately explain to taxpayers what constitutes an actual "claim" or "petition"

for refund. This Court previously addressed this issue in *Rohde v Ann Arbor Pub Sch*, 479 Mich 336; 737 NW2d 158 (2007) when it held that "Plaintiffs were not required to use the word "demand." All that is required is a communication that would reasonably be understood as a demand." *Id.* at 344; 737 NW2d at 162. Thus, there is no specific language that a taxpayer must use in making a "claim" or "petition" or a "demand" for refund. However, it appears on its face, that a taxpayer must do more than simply "disagree" with an assertion that additional tax is owed.

Had the Department, imbued with the authority contained in MCL 205.1(a)(c)("The department is the agency of this state responsible for the collection of taxes and is responsible for...[s]pecialized service for tax enforcement, through establishment and maintenance of uniformity in definition, regulation, return, and payment") and MCL 205.1(1)(b)("The department shall prepare a brochure that lists and explains, in simple and nontechnical terms, a taxpayer's protections and recourses in regard to a departmental action administering or enforcing a tax statute, including...[t]he procedures for claiming refunds and filing complaints.") issued rules or regulations or forms and instructions regarding the making of a claim, petition or demand for refund, the issue presented to this Court would be moot.

2. It Is Paramount That Tax Statutes Be Understandable By Taxpayers As A Matter Of Good Public Policy And To Encourage Compliance.

As a matter of good public policy, clear, unambiguous statutes are necessary. Taxpayers must be able to understand the laws passed by the Legislature so they may comply. Tax statutes must be clear as they affect many aspects of daily life for residents of the state, as well as businesses that are authorized to conduct business in the state. Taxes are a deprivation of property under constitutional provisions, whether the payee is sophisticated or not. An ambiguous tax statute is contrary to good tax policy and efficient administration, and the courts must interpret the legislative intent to give statutes a clear, precise meaning.

B. A Claim or Petition or Demand For Refund Is Made When The Department Receives Adequate Notice of Such Demand From The Taxpayer.

1. Adequate Notice Requires That The Department Is Fairly Informed Of The General Purpose Of What Is Being Considered.

Providing adequate notice permeates many areas of the law, and is not limited to the area of taxation or claims for refund. This Court has addressed the issue of adequate notice many times. See, *In re Petition by Treasurer of Wayne County for Foreclosure*, 478 Mich 1; 732 NW2d 458 (2007) which set forth the parameters for resolving whether constitutionally adequate notice was afforded to a party. This Court adopted the holding of the United States Supreme Court for due process when it held:

> The United States Supreme Court recently has held that "due process requires the government to provide 'notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'
>
> Furthermore, '[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' However, '[d]ue process does not require that [the government] receive actual notice. [*In re Treasurer of Wayne County*, 478 Mich at 9, (citing *Gillie v Genesee County Treasurer*, 277 Mich App 33, 355; 745 NW2d 137.)]

In reviewing the pertinent facts to determine when the Department had "adequate notice" of Ford's refund claim, the Court is permitted to review a variety of sources when defining a term. See, e.g., *Gerling Kozern Allgemeine Versicherungs AG v Lawson*, 472 Mich 44, 57; 693 NW2d 149 (2005). The Department provided several dictionary definitions of "notice" in its appendix [Appellee's Br., App. 3b], but failed to provide a definition for adequate or adequacy. Black's Law Dictionary defines "adequate notice" as "[s]ufficient and proper notice that is intended to and likely to reach a particular person or the public; notice that is legally adequate given the particular

circumstance." *Black's Law Dictionary*, (9th ed 2009). But notice alone is insufficient. The notice needs to be adequate. It needs to be "equal to or sufficient for a specific requirement." *Id.* at 9.

The Section finds these dictionary definitions unhelpful in aiding taxpayers to understand adequate notice in relationship to MCL 205.22. They also fail to assist the Court in clarifying the statute. The Section urges the Court to look beyond mere dictionary definitions and determine from a practical standpoint what constitutes adequate notice in communications with the Department.

2. Neither Ford's Disagreement with the Audit Determination Letter or Ford's Request For an Informal Conference Provided the Department Adequate Notice That a Demand For Refund Had Been Made

Statutory construction of MCL 205.30 is neither new, nor an issue of first impression. This Court has previously held that "Section 30(2) requires that the claim be one made by the taxpayer seeking a refund either in a tax return or by separate request." *NSK Corporation v Dep't of Treasury*, 481 Mich 884; 748 NW2d 884 (2008). In *NSK*, this Court determined that the refund claim was made when the taxpayer responded to the Department's Audit Determination Letter, agreeing with the amount of the refund, but demanding interest on the refund. *Id.* This case is distinguishable from *NSK*, as here, the taxpayer's response to the Audit Letter did not contain a demand for refund.

Ford's contention that the indication of an "x" on the line indicating "disagrees with this determination" on the August 3, 2005 Audit Determination Letter was simply an "x" to note disagreement. There was no language added to, or indicated on, the pro forma face of the standard form of the Audit Determination Letter that could serve as demand language. Ford's completion of the "agrees" or "disagrees" choices on the face of the Audit Determination Letter failed the standard set forth by this Court in *NSK*, as it was not a separate request for a claim for refund.

Nothing was demanded or stated, other than Ford's disagreement with the determination. While it can be arguably implied that a disagreement as to a tax deficiency would logically lead to the conclusion that a refund would be desired, the Section does not believe such implied implication gives rise to "adequate notice." The same standard, if applied to taxpayer's by the Department, could lead to havoc in the administration of taxes, with the Department able to allege that a tax deficiency could serve as "adequate notice" of a demand for payment due, commencing the statutory period for filing a claim.

Nor did Ford's request for an informal conference fulfill the adequate notice requirement. In its informal conference request, Ford indicated the adjustments that it disagreed with, and stated: "The taxpayer will be working with the Department's audit team to narrow the issue of dispute, in the meantime, please contact me if you have any questions." There was no demand, claim, or any verbiage that indicated anything other than the disagreement with the alleged tax deficiency. Indeed, the highlighted language infers that the issue of dispute was subject to further narrowing, and thus a final deficiency amount had not yet been determined. [Appellant's Br., App. 5-B, pp 146a-150a, Tab K].

3. The Department Received Adequate Notice Of Ford's Demand For Refund Of The Contested Amounts When Ford Paid The Purported Amounts Due Under Protest By Applying Its Amounts On Deposit, And Withdrew Its Request For An Informal Conference Citing MCL 205.22.

The Department's introduction states that "[s]ometimes taxpayers overpay their taxes." [Appellee's Br. at 1]. It then goes on to state that the plain language of the statute, MCL 205.30 requires a "taxpayer to take a simple step – it must ask for the money back." *Id.* The Department further opines that Ford failed to "clear this minimal hurdle," rather; it merely checked the box next to "disagree." *Id.* The Section agrees to a certain extent. As noted supra, if a return indicates an overpayment, that is sufficient to constitute a claim for refund. MCL 205.30. If a claim for

refund arises not from a return, but is instead a result of an audit, the taxpayer must communicate its claim for refund via a petition or a demand that is in each case, adequate. A mere disagreement as to an audit determination cannot be adequate, as a contested tax may not yet have been paid, or later adjustments may resolve such disagreement. Even if there were "amounts on deposit" sufficient to cover the additional tax due, there was no separate demand for the return of these amounts. There was simply an "x" on a prescribed form on a line for providing a response as to disagreement with proposed adjustments. The Section does not believe that the Department was given adequate notice of a demand for refund at the time Ford disagreed with the Audit Determination Letter or the Final Audit Letter. At these points in time, the Department received notice that Ford disagreed with the Department's findings.[3]

The Department has the legislative authority to promulgate forms and regulations to aid taxpayers. See MCL 205.1(1)(b); 205.5(1)(c). Despite the Legislature's grant of this authority, the Department has neither drafted a specific form for refund claims (as the Internal Revenue Service has), nor has it issued rules or provided guidance or specific instructions on the matter.[4]

Using the simple timeline provided supra, the Section suggests to the Court that adequate notice of Ford's demand for refund occurred when Ford separately stated more than just mere "disagreement" with the tax deficiency. More was required. It was when Ford stated that the contested amounts had been paid "under protest" that the requirement had been met. At this point,

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[3] It is unclear as to the exact nature and status of the "amounts on deposit." The record confirms that Treasury acknowledged that such overpayments of estimated tax would be applied to offset future deficiencies of Ford. [Appellant's Br., App. 5b, p 112a, Tab C]. And even if such amounts had been applied to the deficiencies in the Audit Determination Letter, the application of such amounts did not constitute a demand for refund.

[4] The Appellant urges the Court to adopt the same standards as the Internal Revenue Service. Appellant states that there is a well-established body of federal law regarding adequate notice, and that the term means "fairly advise." The Section suggests that although this Court may look to Federal standards when applying state tax law, it is certainly not binding.

Ford used language that sufficed to demonstrate a demand was being made: that the contested taxes that had purportedly been satisfied by the amounts on deposit, be returned, as they had been paid "under protest."[5] Thus, the Department had adequate notice at the time Ford withdrew its informal hearing request, as it was this point at which Ford directed the Department "to apply its amounts on account to the audit deficiency, together with applicable interest, and treat such payment as an "payment under protest" within the meaning of MCL 205.22." [Appellant's Br., App5-B, pp 129a-131a, Tab D]. At this time, the Department had been notified that the application of the amounts on deposit had been made under protest pursuant to MCL 205.22, which cannot be misinterpreted. It was clear that Ford was seeking a refund of the amounts paid. It was not the withdrawal of the request for an informal conference that was pertinent in this correspondence, it was the language used to delineate that the application of overpayments of tax was not made to fulfill the tax deficiency, but were made under protest, and that Ford was seeking a refund pursuant to MCL 205.22. The Department is incorrect when it alleges that the subsequent filing at the Court of Claims was controlling. On August 25, 2006, a petition of claim of refund had been made within the meaning of MCL 205.22.

IV. CONCLUSION

A claim or petition for refund is made when the Department receives adequate notice from a taxpayer that the taxpayer seeks a return of taxes. Adequate notice is the proper standard to apply in this case, but it must be more than adequate notice of a disagreement. Ford could not demand a refund prior to the date it had contested the payment of tax. Once the contested tax had been paid by the application of amounts "on deposit" under protest, Ford sought a refund. It is immaterial that at the same time, Ford withdrew its request for an informal hearing. Ford had clearly notified

[5] Words other than "under protest" could have been used to effectuate the same intent; however, these are the words used by the taxpayer, and are commonly used to demand a refund.

the Department that it would seek recourse under MCL 205.22. The Department acknowledged Ford's correspondence with its reply of September 15, 2006. The Department cannot claim that it did not have adequate notice. Adequate notice was given on August 25, 2006, when Ford made its payment under protest within the meaning of MCL 205.22. Therefore, interest should have begun to accrue 45 days from August 25, 2006.

Date: January 31, 2014

Respectfully submitted,

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