STATE OF MICHIGAN
IN THE SUPREME COURT

FORD MOTOR COMPANY,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.

Michigan Supreme Court No. 146962

Court of Appeals No. 306820

Court of Claims No. 06-182-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 OF DEFENDANT-APPELLEE MICHIGAN DEPARTMENT OF TREASURY

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Defendant-Appellee Michigan Department of Treasury agrees with Plaintiff-Appellant Ford Motor Company's statement of jurisdiction.

STATEMENT OF QUESTIONS PRESENTED

1. This Court has required that a taxpayer make an affirmative refund request before interest begins to accrue. Here, Ford did not affirmatively request a refund, quantify any dollar amount as overpayment, or even identify the items in dispute; instead, it simply checked a box next to "disagrees with this determination" in response to a multi-issue, multi-year audit. Treasury was able to determine the alleged amount of overpayment only after Ford instituted a lawsuit identifying the specific audit issue it disagreed with and the refund requested. Does the prior check-the-box statement of "disagrees" qualify as a claim for refund that provides "adequate notice" to Treasury such that Treasury can respond and avoid payment of interest?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Lower court's answer: No.

2. Ford's informal-conference request similarly did not affirmatively request a refund, quantify any dollar amount as overpayment, or even identify which item in dispute could have justified a refund. Does this request qualify as a claim for refund that provides "adequate notice" to Treasury?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Lower court's answer: No.

STATUTORY PROVISIONS INVOLVED

MCL 205.30 provides, in pertinent part:

(1) The department shall . . . refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under section 23. . . .

(2) A taxpayer who paid a tax that 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 claim for refund. . . .

(3) The department shall certify a refund to the state disbursing authority who shall pay the amount out of the proceeds of the tax in accordance with the accounting laws of the state. Interest at the rate calculated under section 23 for deficiencies in tax payments shall be added to the refund commencing 45 days after the claim is filed or 45 days after the date established by law for the filing of the return, whichever is later . . . .

INTRODUCTION

Sometimes taxpayers overpay their taxes. If a taxpayer thinks it has made "an overpayment of taxes," it may "petition the department for refund of the amount paid." MCL 205.30(1) & (2). This plain language requires the taxpayer to take a simple step—it must ask for the overpaid money back. The taxpayer here did not even clear that minimal hurdle. When Ford received a preliminary audit letter showing that it owed more than $21 million in taxes, it responded simply by placing an "x" next to "disagrees with this determination" on the letter and sending it back to Treasury. (Ford's App. 126a.)

That statement was not a "petition for refund of the amount paid" or a "claim for refund" for "an overpayment of taxes." MCL 205.30(1) & (2). All that Ford's statement conveyed was that Ford disagreed that it owed $21,384,305. It did not say it had already paid and wanted its money back.

Even more, the statute indicates that a refund petition must contain at least *some* specificity—it gives Treasury "45 days after the claim is filed" before any interest begins to accrue on the alleged overpayment. MCL 205.30(3). The only logical reason for this provision is to give Treasury 45 days to investigate the refund claim so it can decide whether to grant the refund or not—and if not, to incur the risk of paying interest on the overpaid amount. And to do that investigation, especially in a context like this—the audit covered a four-year tax period and 15 discrete issues (with multiple sub-issues)—Treasury needs some specificity as to grounds for and amount of the refund. Otherwise, the 45-day period is useless.

This case also presents a related question: did Ford's request months later for an informal conference amount to a petition for refund? No, for the same reason: requesting a conference is not a petition for refund—it is a request for a meeting. Like the "disagree" statement, Ford's letter requesting an informal conference never asks for a refund; it merely identifies three areas of dispute, without indicating a refund amount or whether it could have carried forward a refund if it prevailed on any or all of the disputed areas. And Ford then withdrew its request, passing up its chance to pay the tax under protest and then petition for a refund at the conference.

Ford attempts to avoid this straightforward analysis by arguing that the refund claim does not itself need to claim a refund; instead, Treasury should just know Ford was seeking a refund, because of all Treasury knew from the long audit process. But the statute requires Ford to "petition for refund" of overpayments by filing a claim (or declaring on a tax return that overpayment occurred, a circumstance not applicable here).

The fact that Ford had prepaid Treasury (by not claiming a refund for a prior overpayment) also does not free Ford from the statutory requirement that it petition for a refund. It does not convert every statement Ford makes to Treasury into a claim for refund. Filing a refund claim is a minimal step for any taxpayer (let alone one as sophisticated as Ford) to take, and it is a necessary step to put Treasury on notice of refund claims. And because Ford did not take this minimal step, Treasury did not know until months later, when Ford filed a complaint in the Court of Claims, that Ford sought a refund. This Court should hold that Treasury does not have to pay interest on those months before Ford actually requested a refund.

STATEMENT OF FACTS

The Audit Process

All Michigan taxpayers, large or small, from local party stores to Ford Motor Company, are subject to the audit procedures found in the Revenue Act. MCL 205.3(a). Depending on the size and scope of the taxpayer's business, an audit can take as little as a few days to many months to complete. ("The size and complexity of a business determines the scope of the audit and what records will be examined during the audit." (Treasury's App. 7b-8b.)) It may require a single auditor working directly with the business owner or an entire audit team and multiple specialized taxpayer representatives.

A single audit can, and often does, addresses multiple sub-issues and multiple tax years. The audit in this case covered Ford's Single Business Tax ("SBT) liabilities for the period beginning January 1, 1997 and running through December 31, 2001. (Ford's App. 197a.) The audit reviewed "a group composed of fifteen separate but related entities filing Single Business Tax returns on a combined basis." (Ford's App. 197a.)

The audit addressed multiple topics, including: gross receipts, business income, compensation, additions, subtractions, apportionment, capital acquisition deduction/recapture, business loss deduction, statutory exemptions, reductions, investment tax credits/recapture, and credits. (Ford's App. 200a–217a.) Within each audit item listed above there were multiple sub-issues, among them Volunteer Employee Beneficiary Association ("VEBA"), the issue ultimately appealed to the

court of claims. (Ford's App. 202a–203a.) The VEBA issue was not the only issue in dispute during the audit that Treasury resolved against Ford.

The audit process is intended to be open and collaborative so that an auditor can review the relevant taxpayer information but at the same time, when possible, answer taxpayer questions during the process. (Treasury's App. 7b-8b.) The taxpayer, or their employees or designated tax representatives, often work with the auditor(s) throughout the process.

Upon completion, an audit report may result in a finding that the taxpayer paid the correct amount of tax for the tax period at issue, that the taxpayer underpaid and should be required to remit additional tax, or that the taxpayer overpaid and may be due a refund. Here, the auditor discovered underpayment items and overpayment items, with a net result of underpayment for the tax period. (Ford's App. 217a – 220a.)

After completing an audit, Treasury issues a preliminary audit determination, and if necessary, a final audit determination letter. In this instance, Treasury issued both. (Ford's App. 102a; 117a.) Ford responded to the preliminary audit determination letter and marked an "X" next to "disagrees with this determination," on August 3, 2005. (Ford's App. 102a.)

Following an audit, if Treasury identifies a deficiency it must issue a notice of intent to assess the tax. MCL 205.21(2)(b). Treasury issued its intents to assess on October 18, 2005. (Ford's App. 144a-145a.)

The next month, Ford responded and requested an informal conference. (Ford's App. 147a.) (A taxpayer does not have to pay disputed amounts in order to

request an informal conference; the statute only requires prepayment of the undisputed amounts. MCL 205.21(2)(c).) In its request, Ford noted that the intent to assess was not exactly the same as the audit determination letter, and identified disagreement with certain audit issues. (Ford's App. 147a-148a.) Ford also indicated that it intended to narrow its disputed issues. (Ford's App. 148a.)

The informal conference never occurred, because on August 25, 2006, Ford indicated by letter that it intended to withdraw its request and intended to file an action in the Court of Claims. (Ford's App. 130a.) In that same letter, Ford finally took the step of paying the assessed amount by asking "that the audit deficiency, together with the applicable interest, be satisfied with the amounts currently being held by [Treasury] 'on deposit.' " (Ford's App. 130a.) Ford also asked that "the application of the amounts on deposit to the audit deficiencies . . . be viewed as a payment under protest within the meaning of MCL 205.22." (Ford's App. 130a.)

Within one month, Treasury responded, indicating that Ford's request was completed and the amounts on deposit would be applied and considered "paid under protest." (Ford's App. 133a.) Less than a week later, on September 19, 2006, Ford formally withdrew its request for informal conference. (Ford's App. 372a.) Treasury granted the request, dismissing the informal conference. (Ford's App. 374a.)

On or about December 12, 2006, Ford filed its complaint in the Court of Claims identifying the disputed amounts, disputed issues, and requesting a refund of specific taxes paid under protest. (Ford's App. 55a-68a) This filing was the first filing to actually request a refund.

Operation of Interest

Refund Interest

If it is determined that a taxpayer has remitted tax in excess of what was owed, Treasury must refund the overpaid tax and, in some situations, pay statutory interest. MCL 205.30. Overpayment interest begins to accrue 45 days after the taxpayer provides "adequate notice" of the claim for refund. *Lindsay Anderson Sagar Trust v Department of Treasury*, 204 Mich App 128; 514 NW 2d 514 (1994), lv den 447 Mich 905 (1994). Interest represents the "time value of money," a financial term of art here. *ANR Pipeline Co v Dep't of Treasury*, 266 Mich App 190, 194 n 2; 699 NW2d 707 (2005), quoting *Perry Drug Stores, Inc v Dep't of Treasury*, 229 Mich App 453, 458 n 4; 582 NW2d 533 (1998). In this context, interest begins 45 days after the refund claim is filed.

In the instant case, Ford made a refund request, such that Treasury could reasonably respond, on or about December 12, 2006. That is the first date when Ford had paid under protest and requested a refund such that Treasury could reasonably respond. Interest began to accrue 45 days after that notice, or on January 27, 2007.

PROCEEDINGS BELOW

Court of Claims

Ford filed its appeal in the Court of Claims on or about December 12, 2006. The Court of Claims, following motions for summary disposition, found for Treasury on Ford's tax liability in its opinion issued February 6, 2008.

Michigan Court of Appeals

Ford appealed to the Michigan Court of Appeals on February 25, 2008. The Court of Appeals reversed the Court of Claims in its May 20, 2010 published opinion, finding that Ford was not liable for the assessed taxes, and remanded for determination of the proper refund amount.

Michigan Supreme Court

Treasury filed its application for leave to appeal to this Court on July 27, 2010. The Court denied Treasury's application by order entered January 13, 2011.

Court of Claims

On the remand from the Court of Appeal's decision, Treasury issued a refund of $15,762,944 on September 19, 2011. Thereafter, Ford filed its motion for additional refund in the form of interest. A hearing was held on October 6, 2011. Following the hearing, the court found for Ford as to the operative dates and entered an order requiring payment of additional interest.

Michigan Court of Appeals

Treasury appealed to the Michigan Court of Appeals. The parties briefed the issues and, following oral argument, the Court of Appeals affirmed in part and reversed in party the Court of Claims' decision. Relevant to the dispute before this Court, the Court of Appeals reversed the Court of Claims' decision on the refund-interest claim and award of attorney fees, agreeing with Treasury. The Court of Appeals' February 26, 2013 unpublished opinion is the subject of the instant appeal.

SUMMARY OF ARGUMENT

The Revenue Act, MCL 205.1 *et seq*, requires that certain tax refunds be issued with statutory interest. Although interest represents compensation for the time value of money, a taxpayer is not entitled to interest for the entire time they are without their money. Instead, interest does not begin accruing until 45 days after a taxpayer makes a refund claim. MCL 205.30(3).

The word "refund" understands that something was previously paid. And the phrases *claim for refund, petition,* and *refund request,* as provided in the controlling statute and existing case law, require the taxpayer to petition, file, or otherwise initiate a request for "refund of the amount paid." MCL 205.30(2); *NSK Corp v Department of Treasury,* 277 Mich App 692; 746 NW2d 886 (2008).

So interest accrues 45 days after there is *both* a payment under protest *and* a request that all or a portion of that payment be refunded. The taxpayer need not prove the validity of the claim before interest begins to accrue, but it must provide adequate notice of the claim such that Treasury can reasonably respond and avoid paying additional interest. *Lindsay Anderson Sagar Trust v Department of Treasury,* 204 Mich App 128; 514 NW 2d 514 (1994), lv den 447 Mich 905 (1994). Ford's position is inconsistent with the plain language of the statute. Ford's position is also inconsistent with existing case law regarding the adequacy of notice.

STANDARD OF REVIEW

The questions before this Court require interpretation of the Revenue Act, MCL 205.1 *et seq*. Statutory interpretation is a question of law that is reviewed *de*

novo. *Wickens v Oakwood Healthcare System*, 242 Mich App 385, 389; 619 NW2d 7 (2000). This standard of review applies to both issues addressed here.

ARGUMENT

I. Ford's first refund claim was its filing in the Court of Claims, and thus interest did not begin to accrue until 45 days after that filing.

This case represents Ford's attempt to claim interest to which it is not entitled. Ford's "x" next to "disagrees with this determination" is not a refund claim. Ford's informal-conference request also was not a refund claim. The Court of Appeals understood that Ford's position would lower the bar for "adequate notice" of a refund claim to an unmanageable standard.

Whatever method a taxpayer uses to claim a refund, it must be clear. Ford's position is inconsistent with the plain language of the statute, inconsistent with existing case law, and contrary to any reasonable interpretation of "adequate notice." Its position, if accepted, would also undermine Treasury's ability to protect the public fisc, because it means Treasury has to guess as to when a refund request is being made, rather than requiring taxpayers to expressly ask for a refund.

A. Ford's position that a statement of disagreement with an assessment is a refund claim is inconsistent with the plain language of the statute.

In Michigan, certain tax refunds accrue interest beginning "45 days after the claim [for refund] is filed." MCL 205.30(3). The date of the refund filing is therefore of great significance as it relates to calculating refund interest. If a taxpayer files a tax return or amended tax return showing overpayment, there is a specific dollar amount listed and the return identifies the source of that refund. (Ford's App. 287a-288a.) By statute, such a filing is considered "a claim for refund." MCL 205.30(2). However, a taxpayer can request a refund outside a tax return. MCL

205.30(2). The question becomes, what is required in a refund request that is made outside of a return?

Michigan law provides that "[a] taxpayer who *paid a tax* that the taxpayer *claims* is not due may *petition* the department for *refund of the amount paid.*" MCL 205.30(2) (emphasis added). For meritorious refund claims, "interest . . . shall be added to the refund commencing 45 days after the claim is filed or 45 days after the date established by law for the filing of the return, whichever is later." MCL 205.30(3).

On its face, the statute requires (1) prior payment of a tax and (2) a "claim" for "refund" of an "amount paid." A taxpayer can make such a request by "petition" that the taxpayer must "file" with Treasury. MCL 205.30(2). But the Revenue Act does not define the terms claim, petition, or refund.

In these situations, it is appropriate to consult a dictionary to determine the term's ordinary and appropriate meaning. *People v Flick*, 487 Mich 1, 11; 790 NW2d 295 (2010). *The American Heritage College Dictionary*, Fourth Edition, defines a claim as: "to demand . . . ask for . . . the sum of money demanded." (Treasury's App. 1b.) And *Black's Law Dictionary*, Second Pocket Edition, defines a claim as: "[a] demand for money or property to which one asserts a right." (Treasury's App. 2b.) Here, Ford did not make a demand for anything, much less a specific sum of money.

American Heritage defines a refund as "a repayment of funds" and "an amount repaid." (Treasury's App. 4b.) Inherent in repaying, or an amount repaid, is that something was paid in the first place. Here, as evidenced by Ford's letter,

Ford did not request that this tax deficiency be considered as "paid under protest" until August 2006—a full year after the August 2005 "x" letter and nine months after the request for an informal conference. (Ford's App. 130a.) Ford's August 2006 letter "request[s] that the audit deficiency, together with the applicable interest, be satisfied with the amounts currently being held by the Department 'on deposit'" and states that this should "be considered a 'payment under protest.'" (*Id.*)

Finally, *American Heritage* defines petition as "[a] formal document requesting a right or benefit from an authority, to ask for by petition, request formally." (Treasury's App. 5b.) And *Black's Law* defines petition as "a formal written request presented to a court or other official body." (Treasury's App. 6b.) Here, Ford's "x" does not request or demand anything; it is a vague position statement.

Ford's "x" means it disagrees with everything in the preliminary audit determination. But, "by literally alleging everything," here by implication, "this allegation alleges nothing." *Kincaid v Cardwell,* 300 Mich App 513, 530; 834 NW2d 122 (2013) quoting *Dacon v Transue,* 441 Mich 315, 330; 490 N.W.2d 369 (1992). Read literally, Ford's "x" means that Ford also disagreed with everything in the audit, including items in its favor and Treasury's representations of Ford's potentially disputed audit items. Such a statement of blanket disagreement is not a request for a refund; indeed, it is hardly conveys any information at all.

B. Ford's position that an "x" is a refund claim is inconsistent with existing case law.

Two cases, *Lindsay Anderson Sagar Trust v Department of Treasury*, 204 Mich App 128; 514 NW 2d 514 (1994), lv den 447 Mich 905 (1994), and *NSK Corp v Department of Treasury*, 481 Mich 884; 748 NW2d 884 (2008), discuss this very issue. Ford and Treasury both rely on these two cases. Treasury asserts that, if these cases are read in their entirety and applied to the facts of this case, only one logical result is possible; Ford did not meet the statutory requirements such that interest should accrue until 45 days after Ford's filing in the Court of Claims.

1. The Michigan Court of Appeals has held that a claim is considered filed once Treasury has been provided "adequate notice" of a claim for refund.

In *Lindsay Anderson Sagar Trust v Department of Treasury*, 204 Mich App 128; 514 NW 2d 514 (1994), lv den 447 Mich 905 (1994), the trustee for the taxpayer wrote a letter to Treasury requesting a refund of $156,961, a sum certain, on May 18, 1989. *204 Mich App* at 129. After deciding one issue against Treasury (that interest could begin accruing when the taxpayer requested the refund, not just when the taxpayer provided the documentation necessary to fully support its refund claim), the court turned to the issue of adequate notice. Observing that "[t]he only possible ambiguity in the statute . . . [is] when a claim for refund is considered to be filed," the court held that "a claim is filed when defendant receives adequate notice of the claim." *Id.* The court explicitly included the modifier "adequate" before notice, indicating that the claim must include some level of specificity.

Although *Sagar Trust* is not binding on this Court, its reasoning is persuasive. Although a taxpayer need not prove its claim before the interest clock begins to run, it must provide adequate notice of the claim for refund. This reading is consistent with the 45-day time period within which Treasury may avoid paying any interest. MCL 205.30(3). Without "adequate notice," those 45 days are rendered meaningless.

2. In *NSK Corp*, this Court held that the taxpayer had to affirmatively request a refund; Treasury's awareness of an overpayment did not trigger the accrual of interest.

In *NSK Corp v Department of Trea*sury, 481 Mich 884; 748 NW2d 884 (2008), this Court considered what constituted a request for a refund: did the taxpayer have to affirmatively make a request, or should a notice from Treasury to the taxpayer of an overpayment be considered to be a request for a refund. Leaving other issues untouched, this Court reversed only the Court of Appeals' determination "that claim for a refund was made under MCL 205.30(2) on the date the Department of Treasury notified the plaintiff that it was entitled to a refund." *Id at 884.* Instead, this Court held that MCL 205.30(2) "requires that the claim be one made by the taxpayer seeking a refund either in a tax return or by separate request." *Id.* In short, the Court held that Treasury's awareness of a potential overpayment was not enough because the statute requires the taxpayer make an affirmative request for a refund before the 45-day clock for interest accrual begins to run.

This Court further stated that, "[i]n this case, the plaintiff made such a claim when it responded, on April 26, 2005, to the Treasury Department's Audit

Determination Letter, agreeing with the amount of the refund, but demanding interest on the refund." *Id* at 884-85. Notably, the Court did not stop at "when it responded . . . to the . . . Audit Determination Letter," but further required the taxpayer to actually demand the overpayment interest.

C. Ford's informal-conference request was not a refund request under the statute or relevant case law.

Ford did request an informal conference under MCL 205.21. (Ford's App. 147a.) But its request did not constitute a "claim for refund" under MCL 205.30. While less perfunctory than Ford's "x" letter, the request never asserted that Ford had made an overpayment or requested a refund. (Ford's App 147a–148a.) The letter simply requests an informal conference to discuss three issues in the intent to assess. While it would have been simple to say in that letter, "Ford requests a refund of X dollars it overpaid on retiree health costs," it did not include such a statement; it never identified, for example, the amount it sought refunded. Instead, it simply identified issues where it disagreed with Treasury's treatment of them, and said it would work with Treasury's "audit team to narrow the issue[s] [in] dispute." (*Id.*)

In any event, the sufficiency of Ford's informal-conference request is beside the point for two reasons. First, Ford had not previously paid the amount under protest. (Ford's App. 130a-131a.) Second, Ford withdrew that potential refund claim. (Ford's App. 372a.)

Ford filed its informal-conference request on or about November 17, 2005. (Ford's App. 147a.) Then, more than nine months later, Ford asked to pay the tax

under protest for purposes of pursuing a *potential future* refund claim in the Court of Claims. (Ford's App. 130a.) Until that payment under protest, a refund request would be impossible. MCL 205.22. Ford withdrew its informal conference request soon thereafter. (Ford's App. 372a.)

Then, after more than 80 days passed without anything pending, Ford filed its appeal in the Court of Claims as to the VEBA issue, one of many deficiencies addressed in the audit. (Ford's App. 55a-68a.) At that point, Ford had both paid the tax under protest *and* requested a refund of an amount paid, specifying the reason for its request. Interest should have accrued beginning 45 days after the Court of Claim filing. That is exactly what the Court of Appeals held.

II. A refund request is an independent filing that must stand on its own and affirmatively request relief.

This Court has asked whether Ford's "x" next to disagrees should be considered a refund claim "in light of events and communications that preceded that response, including information provided to the defendant by the plaintiff and the contents of the defendant's Audit Report of Findings." (Ford's App. 224a.) In essence, this Court has asked whether a series of conversations and communications between auditors and taxpayer employees should be aggregated and, ultimately, represented by a single "x." They should not. Doing so would be inconsistent with the language of the statute and would promote confusion, rather than clarity.

Here, Treasury provided Ford with a preliminary audit determination letter covering a four-year audit on multiple issues. (Ford's App. 200a – 217a.) In the

months leading up to that preliminary audit report, the parties had extensive discussions, both written and oral, covering a number of sub-issues. Ford, in response, placed an "x" on a line next to "disagrees" and returned the letter to Treasury. (Ford's App. 126a.)

In that response, Ford did not include any summary of their current disagreements, reference any specific item in the audit report in dispute, or ask for any sum of money as a refund. While it would have been extremely simple to identify a specific refund claim, Ford chose not to do so. Treasury was left to believe that Ford disagreed with the entirety of the audit report, including the potential overpayment and even the auditor's list of disputed items. Neither party could have thought the "x" was a refund request; indeed, Ford itself did not ask for application of a "payment under protest" (such that a refund would be possible) until more than a year later. (Ford's App. 130a – 131a.)

Thereafter, Treasury issued the intents to assess. (Ford's App. 144a-145a.) The listed amount was not the same as the audit determination letter, but Treasury was not bound by its preliminary report. (Ford's App. 133a.) Likewise, Ford was not bound by its prior communications during the audit, whether consistent or inconsistent with its ultimate refund claim. The problem with aggregating is this: which prior communications should Treasury assume, aggregate, and read into Ford's "x"?

The answer is simple: Treasury cannot assume anything. That answer is found in *NSK;* the refund claim must come *from the taxpayer*, and as a result, will

be in the taxpayer's own words. That claim made by the taxpayer must give Treasury notice.

"The essence of notice, when it is sufficient in form and content, is its objective effect on the person to whom it is given, not the subjective intent of the person who gives it. Thus, notice must be clear, definite, explicit, and unambiguous." *Stevens v McLouth Steel Products Corp*, 433 Mich 365, 378; 446 NW2d 95 (1989), quoting 8 Am Jur 2d, Notice, § 2, pp 572-573. Here, it is the content of the request, not the form that controls for purposes of notice. *NSK*, 481 Mich 884 ("interest on the plaintiff's refund accrues 45 days after the later of the date that the tax return requesting a refund was filed *or a separate claim* for a refund was made.") (emphasis added).

Although sufficiency of notice should consider "all of the information at [one's] disposal," the information in this case—including ongoing and changing communications over an extended period of time—did not present a clear picture. *Stevens*, 433 Mich 365 at 378. Ford's letter noting the change from the audit figures to the actual assessment illustrates this point. It is also evident that, as the parties continued to discuss the entire audit, the items of agreement and disagreement were subject to change. (Ford's App. 148a ("The Taxpayer will be working with the Department's audit team to narrow the issue[s] [in] dispute.").)

Tax returns are not filed over the phone or verbally over coffee. A taxpayer must file a written, completed, and signed tax return. Likewise, when a taxpayer seeks to challenge an intent to assess through an informal conference, that request

requires a basic writing outlining the dollar amount in dispute and an explanation of the dispute. MCL 205.21(2)(c).

A complaint filed with a court or tribunal must provide notice of the disputed issues and sufficient information for the defendant to respond. MCR 2.111(B)(1). Treasury asks this Court to apply the same notice requirements inherent in the other refund claim methods: ask for particular relief, state your reasons, and put it in writing.

It would have been easy enough for Ford to state, in its own words, its refund claim and the basis for that claim. It did not, instead electing to say (six years later) that its "x" was a refund claim. That position requires sorting through and aggregating all prior conversations and communications and incorporating them in to that "x."

Forcing Treasury to aggregate ongoing and perhaps inconsistent conversations and cobble them in to a best guess of what a taxpayer means by "x" is untenable, especially given how the facts of this case line up with those of *NSK*. In *NSK*, Treasury notified the taxpayer of a potential refund and NSK responded, agreeing with the refund amount but disputing specifically the interest calculation. Here, Treasury identified potential disputed sub-issues, and Ford responded by disagreeing. Ford did not specify its disagreement, adopt the auditor's list of disputes, or request any specific action. Ford's "X" was indefinite and inactionable.

A "check the box" designation of "disagrees" is not the same as an affirmative refund claim. That blanket statement, if Ford's position is adopted, would reject the audit in its entirety—including any adjustments in Ford's favor and any statements

as to Ford's disputed items. (Ford's App. 219a.) In reviewing the "x," Treasury could not know whether the disagreement was as to an audit methodology, a specific figure, particular wording, or a specific sub-issue. The auditor may well have mischaracterized Ford's disputed items—that is, Ford might have meant that it thought 10 different items were really still in dispute. Treasury certainly could not identify a "claim" such that a refund could be calculated, much less returned, if appropriate.

Ford's position would have significant consequences, and well beyond this specific case. In simply offering a blanket "disagrees" by checking a box, a taxpayer may start the interest meter running prematurely. And that meter would run, notwithstanding the 45 days provided by the Legislature, without any way for Treasury to avoid paying interest until it knows what, if any, refund was requested.

A. Even if Ford's request for an informal conference were deemed a refund request, the tax had yet to be paid, so no refund was possible, and Ford later withdrew its informal-conference request.

This Court has asked the parties to address a second question: whether Ford's request for an informal conference, later withdrawn, was a refund claim for purposes of calculating interest. The simple answer *in this case* is no.

Ford sent its informal-conference request in response to Treasury's October 18, 2005, intent to assess. (Ford's App. 147a; 144a-145a.) That correspondence identified specific (and current) disputed items. It is important to note, however, Ford's recognition in that letter that the amounts listed on the intent to assess were "inconsistent with the Audit Determination Letter." (Ford's App. 147a.) Moreover,

the letter indicates that the parties will continue "working with the Department's audit team to narrow the issue[s] [in] dispute." (Ford's App. 148a.)

These statements are relevant with regard to the prior response of "X." First, it is clear that the parties' positions and communications were fluid and ongoing. It also shows that the parties were continually talking, revising, and updating their positions. This letter provided sufficient information in *this instance* to indicate how Ford characterized its dispute.

But for this characterization to be considered a refund claim Ford still needed to have paid the tax under protest and maintained the claim. Here, Ford did neither; Ford's August 2006 letter agreeing to pay the tax under protest means that Ford had not paid all of the tax under protest as of October 18, 2005, and then Ford withdrew its request. (Ford's App. 130a; 372a.) At the point of withdrawal, although a future filing in the Court of Claims was possible, Ford had no refund pending.

Ford sees this differently. In Ford's view, the fact that it had told Treasury in 2002 that it could apply certain Ford funds retained by Treasury to future tax deficiencies meant that it was *always* in a state of complete payment. Any time Treasury assessed a tax on Ford, Ford's funds on account immediately paid that tax. Under this perspective, any statement Ford then makes disagreeing with a tax determination should be considered a request for a refund of those prepaid amounts.

The problem with this view is that it reads Ford's affirmative, statutory obligation to "petition for refund" out of the picture. Simple statements of

disagreement, like the ones at issue here, do not request a refund. They do not identify a refund amount or a specific dispute, and they therefore deprive Treasury of the statutorily created opportunity to investigate the refund claim to decide whether to refund or not.

Ford relies upon its letter from August 25, 2006, to show that its informal-conference request, later withdrawal, and refiling in the Court of Claims does not reset the interest calculation. (Ford's App. 130a.) But the August 2006 letter cuts against Ford's position. In that letter, Ford indicated that it might, in the future, withdraw its informal-conference request and file a lawsuit. (Ford's App. 130a.) By that same letter, Ford expressed its desire to pay the tax under protest. (Ford's App. 130a.) And on September 19, 2006—only 25 days after the payment—Ford did withdraw the informal-conference request. (Ford's App. 372a.) This 25-day duration is significant because it means that even if the informal-conference request were both a request for refund and a payment under protest, Ford withdrew the request before the 45-day interest-free window had closed. That withdrawal occurred before interest began accruing, so, two days later, on September 21, 2006; Treasury granted the request and had no need to continue any investigation into a refund claim. (Ford's App. 374a.)

On December 12, 2006, after 83 days had passed with nothing pending, Ford filed its lawsuit in the Court of Claims. (Ford's App. 28a.) In the interim, Treasury could not issue a refund because there was no pending refund claim.

In its letter requesting withdrawal, Ford also asked that "the audit deficiency, together with the applicable interest, be satisfied with the amounts

currently being held by [Treasury] 'on deposit.'" (Ford's App. 130a.) "The application of the amounts on deposit to the audit deficiencies," the letter continued, "should be viewed as a payment under protest within the meaning of MCL 205.22." (Ford's App. 130a.)

MCL 205.22 provides that "[a]taxpayer aggrieved by an assessment, decision, or order of [Treasury] may appeal the contested portion . . . to the . . . court of claims within 90 days." The statute also provides that, "[i]n 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."

Here, Ford's own letter shows that it *funded* the deficiency under protest and could therefore request a *re*fund as of August 25, 2006. (Ford's App. 130a.) And because the August 2006 letter said that Ford "intend[ed]" to take some action in the future—specifically the possible filing of a lawsuit requesting a refund. (Ford's App. 130a.) Ford later filed a lawsuit and requested a refund, but until that time, there was nothing pending for Treasury to respond to.

Treasury cannot administer taxes or oversee the state's tax funds based on what might happen. Treasury cannot issue a refund based on what a corporation, or an individual, indicates it might do in the future. When Ford withdrew its informal-conference request and did not take any other action until 83 days later, its refund claim was non-existent.

Prior to filing in the Court of Claims, there was no point in time when Ford had (1) paid the tax under protest, (2) affirmatively requested a refund of the tax,

and (3) stated an amount or articulated an issue such that Treasury could respond within 45 days. The lower court got it right.

Ford's legal position is unworkable and contrary to law. It leaves Treasury with two options: guess what the taxpayer means or do nothing until there is sufficient information to act, letting interest accrue at the expense of Michigan's taxpayers. The lower court stopped just short of the simplest answer: make a written request for a refund that gives sufficient information for Treasury to respond. Still, the lower court did reach the right result. In this case, Ford did not make a refund request until it filed its complaint in the Court of Claims.

CONCLUSION AND RELIEF REQUESTED

Ford's response to the preliminary audit determination letter did not provide adequate notice of a refund claim. Not until Ford's filing in the court of claims was there adequate notice of a refund, claim such that Treasury could reasonably respond. To be clear, a court filing is not required to provide adequate notice. The refund claim must, however, provide sufficient information for Treasury to respond. In this case, the first time Ford paid the tax under protest and provided sufficient notice of a refund claim was the Court of Claims filing.

Ford's argument, if accepted, establishes an unworkable policy and ensures future litigation. Requiring a clear and simple refund request, with the same basic information required in a tax return or a complaint, would avoid future disputes. Treasury asks that this Court affirm the lower court's holding that interest began to accrue on January 27, 2007, 45 days after Ford filed its Court of Claims' complaint.

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