STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS

FORD MOTOR COMPANY,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.

Supreme Court Docket No. 146962

Court of Appeals Docket No. 306820

Court of Claims Docket No. 06-000182-MT

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FORD MOTOR COMPANY'S REPLY BRIEF

Oral Argument Requested

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I. FORD PETITIONED OR MADE A CLAIM FOR REFUND ON AUGUST 3, 2005

Treasury had Ford's money and said it planned to keep the money to cover a tax bill. On August 3, 2005, Ford told Treasury that it "disagree[d] with this determination." Most would agree that there could be no confusion about what Ford was telling Treasury: Ford disagreed that Treasury should keep its tax money. Ford wanted its money back. Ford was asking for a refund of its tax money.

Treasury disagrees. Treasury says it had no idea Ford was claiming a refund and that it could only "guess" what Ford wanted, that it could not "assume anything," and that Ford's August 3, 2005 letter was a "vague position statement" that "hardly convey[ed] any information at all." (Treasury's Br at 11, 13, 18.) Treasury argues that in the *forty-five days* it had to investigate Ford's claim before the interest clock began to run under MCL 205.30, it had no way to determine whether Ford in fact was claiming a refund. (*Id.* at 1.) Treasury's arguments are meritless.

A. The Court should follow its well-established notice precedent and consider "all" information at Treasury's disposal.

Treasury agrees that the question is whether it had "adequate notice" that Ford claimed a refund on August 3, 2005. (Treasury's Br at 6: "Overpayment interest begins to accrue 45 days after the taxpayer provides 'adequate notice' of the claim for refund.") And Treasury agrees that under this Court's well-established notice case law, the "sufficiency of notice should consider '*all* of the information at [one's] disposal.'" (Treasury's Br at 19, quoting *Stevens v McLouth Steel Prods*, 433 Mich 365, 378; 446 NW2d 95 (1989); emphasis added.) Treasury cites this standard in its brief, and notes that the standard comes directly from this Court's decision in *Stevens v McLouth*. (*See id.*)

Yet Treasury then asks the Court not to consider "all" of the information showing it had notice that Ford claimed a refund for the VEBA adjustment, but rather to ignore every fact in the record other than an "x" Ford placed next to "disagrees" on Treasury's August 3, 2005 Audit Determination Letter. Treasury

argues that this "x" must "stand on its own," and that the Court should not "aggregate" all of the other facts showing it had notice. (Treasury's Br at 17.)

Treasury's approach is contrary to this Court's well-engrained notice precedent. This Court stated in *Stevens*: "A person has notice of a fact when, 'from *all of the information at his disposal*, he has reason to know of it. That is, a person is deemed to have notice when he has actual knowledge or when from *all the facts and circumstances* known to him at the time in question, he has reason to know that it exists.'" 433 Mich at 378 (quoting Am Jur 2d, Notice, § 2, pp 572-73) (emphasis added). As Treasury notes, quoting *Stevens*, the "essence of notice" is the "objective effect on the person to whom it is given." (Br at 19.) In gauging that objective effect, the Court does not ignore information at the party's disposal or ignore facts and circumstances showing the party has notice; the Court considers "all of the information" at the party's disposal and "all the facts and circumstances." *Stevens*, 433 Mich at 378. That is not a matter of "aggregating"; it's simply how notice works.

Treasury's position that the Court must look only at Ford's August 3, 2005 letter, "stand[ing] on its own" (Br at 17), to determine whether Treasury had notice of a refund claim is not only inconsistent with this Court's notice law, but also does not make sense. Ford's August 3, 2005 letter was not just a "check-the-box" response that "hardly convey[ed] any information at all" about Ford's specific disagreement, as Treasury argues. (Treasury's Br at 13.) The letter specifically referenced the VEBA audit and the audit documents. The title of the letter was, "Michigan Department of Treasury Audit Determination Letter: Single Business Tax." (App 102a.) The letter specifically identified the audit to which the letter referred: "Audit Period: 12/01/1997 to 12/31/2001." (*Id.*) The letter specifically identified the Treasury representative who conducted the audit: "Audit conducted by: Ronald Flowers, Auditor, Audit Division, Bureau of Revenue, Michigan Department of Treasury." (*Id.*) And the letter specifically referenced "the audit work schedules," which included the VEBA adjustment. (*Id.*) It only makes sense, therefore, to consider the audit work schedules and the Audit Report of Findings in determining whether Treasury had

notice of Ford's claim for refund. As Treasury notes, the "logical reason" for the 45-day grace period the statute grants Treasury before overpayment interest kicks in 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." (Treasury's Br. at 1; emphasis added.) It's also logical for Treasury to review the audit documents referenced in taxpayer's letter during that investigation.

Treasury's position on precisely what a taxpayer is required to do to claim a refund under MCL 205.30 shifts throughout its brief. Treasury starts off saying that the "plain language [of MCL 205.30] requires the taxpayer to take a simple step—it must ask for the overpaid money back." (Treasury's Br at 1.) Then Treasury says a taxpayer has to include "some specificity" in its claim (*id.*); then "Whatever method a taxpayer uses to claim a refund, it must be clear" (*id.* at 11); then an "independent filing that must stand on its own and affirmatively request relief" (*id.* at 17); then what Treasury calls the "simplest answer: make a written request for a refund that gives sufficient information for Treasury to respond" (*id.* at 25).

Treasury goes so far as to suggest that a taxpayer should have to meet the pleading standards of the Michigan Court Rules in order to make a "claim" or "petition" for refund under MCL 205.30: "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 . . . ." (Treasury's Br at 20.) Suffice it to say that nothing in MCL 205.30 suggests taxpayers—often lay people and non-lawyers who have never felt a searing desire to leaf through the Michigan Court Rules—have to meet court pleading standards to ask for a tax refund.

The Court should reject the various heightened requirements Treasury seeks to draft into the statute. The proper standard is this: A taxpayer "petitions" or makes a "claim for refund" under MCL 205.30 when, as a result of a taxpayer communication, and considering all of the facts and circumstances surrounding that communication, Treasury has adequate notice that the taxpayer seeks a refund.

B. **Under all of the facts and circumstances and considering all of the information at Treasury's disposal, Treasury had adequate notice that Ford claimed a refund on August 3, 2005.**

Under this Court's well-established notice standard, this is not a close case. Considering "all of the information at [Treasury's] disposal" and "all the facts and circumstances," *Stevens*, 433 Mich at 378, Treasury had adequate notice that Ford claimed a refund for the VEBA adjustment on August 3, 2005.

Those facts and circumstances included all of the following. Treasury conducted an extensive, multiyear audit of Ford's Single Business Tax returns. As Treasury notes, this was a "collaborative" process, where Ford representatives "work[ed] with the auditor(s) throughout the process," and discussed disagreements. (Treasury's Br at 4.) The dispute concerned taxes relating to Ford's contribution to the VEBA trust. Ford told Treasury that it disputed the VEBA adjustment, and Treasury knew it.

Treasury issued an Audit Report of Findings in mid-2005 that said Ford owed an additional $20 million in taxes, which included taxes for payments to the VEBA trust, plus deficiency interest. (App 197a.) The Audit Report of Findings specifically noted, under the heading "Contested Audit Issues," that Ford "disagrees with the audit determination that payments to the VEBA . . . were compensation, for SBT purposes." (App 219a.) Treasury stated its defense to Ford's objection. (App 203a.) Treasury therefore knew that Ford specifically disagreed that it owed more tax for the VEBA payments.

The Audit Report of Findings then detailed, for each tax year, the specific amounts Treasury claimed were due relating to these VEBA payments. (*Id.*) Treasury provided Ford with "audit work schedules" that further detailed the VEBA adjustments. (*See* App 103a.) These amounts were greater than the amounts Ford had claimed were due in its tax returns. (*See id.*) Treasury therefore knew the specific amounts Ford claimed were taxable, knew the specific amounts Treasury claimed were taxable, and knew the specific amount of the difference.

The Audit Report of Findings specifically noted that "[a]n audit prepayment was made on October 31, 2002" to cover the amounts due, and that Ford had included with its prepayment "specific instructions to

apply the payments" to the VEBA adjustment. (*Id.*) Treasury therefore knew that Ford had already prepaid the amounts Treasury claimed were due for the VEBA adjustment.

On August 3, 2005, Treasury issued an Audit Determination Letter to Ford. Ford responded on the same day that it "disagree[d] with this determination." (App 103a.) The disagreement was with the VEBA adjustment, as spelled out in the Audit Report of Findings. Ford followed up its response to the Audit Determination Letter with another letter nine days later, on August 12, 2005, specifically reiterating that Ford objected to the VEBA adjustment. Treasury then confirmed in writing that it knew the basis of Ford's disagreement. Treasury responded to the letter on September 19, 2005, expressly noting that it understood the specific reason for Ford's disagreement with the audit determination: "You reason that payments made into a VEBA should not be added to the SBT tax base, because they are: 1) not subject to or specifically exempt from federal withholding. 2) are not payments to a 'benefit plan.'" (App 194a.) Treasury therefore knew precisely why Ford wanted its money back.

The Court asked the parties to brief the question "whether the plaintiff taxpayer's response to the defendant Department of Treasury's August 3, 2005 audit determination letter – 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 – was a 'petition . . . for refund" or 'claim for refund' for purposes of the calculation of overpayment interest under MCL 205.30." The answer to that question is: Yes. There is one conclusion from consideration of "all of the information at [Treasury's] disposal" and "all the facts and circumstances." *Stevens*, 433 Mich at 378. Treasury had clear and unequivocal notice that Ford "disagree[d]" that additional tax was due for the VEBA adjustment, and that Ford wanted a refund. Treasury certainly had "adequate" notice.

C. <u>This Court's decision in *NSK Corp v Treasury* supports Ford, and not Treasury.</u>

This Court's decision in *NSK Corp v Treasury*, 481 Mich 884 (2008) confirms that Ford's August 3, 2005 response to Treasury's Audit Determination Letter was a claim for refund under MCL 205.30. In *NSK*,

Treasury audited the taxpayer's single business tax returns and determined that the taxpayer overpaid its tax by $1,444,298. *See* 277 Mich App 692, 694. Treasury issued an Audit Determination Letter showing the overpayment. The taxpayer responded, agreeing with the amount of the refund of tax. This Court held that the taxpayer's response constituted a claim for refund of the overpaid tax shown on the Audit Determination Letter and that overpayment interest began to accrue 45 days after the taxpayer's response under MCL 205.30. 481 Mich at 884.

The Court did *not* require the taxpayer to explain to Treasury in its response to the Audit Determination Letter why it had overpaid its tax by $1,444,298. The Court did not require the taxpayer to provide in its response to the Audit Determination Letter a "summary of [its] current disagreements," as Treasury urges the Court to require here. (Treasury's Br at 18.) The Court did not require the taxpayer to state it had "paid the tax under protest." (Treasury's Br at 22.) The Court certainly did not require the taxpayer to meet the pleading standards of MCR 2.111(B)(1). (Treasury's Br at 20.) The reason for all of this is simple: Treasury had conducted the audit and thus knew the basis for the taxpayer's refund claim.

The same is true here. Treasury conducted the audit, knew that Ford disagreed with the VEBA adjustment, and knew that Ford wanted a refund of the tax on the VEBA adjustment. *NSK* confirms that that Ford's August 3, 2005 response to Treasury's Audit Determination Letter was a claim for refund under MCL 205.30.

D. Ford made estimated tax payments prior to August 3, 2005 that were credited against the liability determined by Treasury.

Treasury argues that Ford had not yet paid the tax due as of August 3, 2005 and therefore as a matter of logic could not have claimed a "refund" of the tax on that date. (*See* Treasury's Br at 21: "the tax had yet to be paid, so no refund was possible.") Treasury is wrong.

There is no dispute in the record that Ford made estimated tax payments to Treasury prior to August 3, 2005. Treasury formally agreed in writing on October 31, 2002 to retain a $22 million estimated

tax payment *specifically* to cover amounts that might become due as a result of the single business tax audit. (App 112a.)[1] Treasury's own VEBA audit documents reflect an "Audit Prepayment remitted to Department on 10/31/2002" (App. 133a) and that "An audit prepayment was made on October 31, 2002" (App. 219a). Treasury's Audit Report of Findings noted that Ford had included with its estimated prepayment "*specific instructions* to apply the payments" to the VEBA adjustment. (App. 219a; emphasis added.) Indeed, Treasury admits in its brief that Ford prepaid the tax. (Treasury's Br. at 2: "The fact that Ford had prepaid Treasury . . . ")

Treasury argues that these payments were mere "deposits" to be applied later, not actual tax payments as of August 3, 2005. But as Treasury itself noted, "Treasury is not a bank for Ford or any other taxpayer." (Treasury's Court of Appeals January 21, 2012 brief, p 27.) Treasury is a tax collector. *See* MCL 205.1; (*see also* App 219: "The Audit Prepayment of $12,261,965 was entered into the Results Table as Amount Collected on 10/31/2002.") A "deposit" may be withdrawn on demand by the depositor; but Ford could not have withdrawn the estimated tax payments on demand. Treasury's acceptance and application of Ford's prepayment was based on Treasury's authority to accept and apply estimated tax payments. Treasury is *required* to credit the estimated payments against the liability. *See* MCL 208.71(7) ("Payments made under this section *shall* be a credit against the payment required") (emphasis added). Here, the liability was determined by Treasury on August 3, 2005 in its Audit Determination Letter, and Ford's estimated payments were payments that were creditable and credited against the liability as of that date. Ford paid the amount due in the Audit Determination Letter as of August 3, 2005.[2]

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[1] Ordinarily, a single business taxpayer was required to make quarterly estimated tax payments, but MCL 208.71(1)-(3) provided that if Treasury "considers it necessary to insure payment of the tax or to provide a more efficient administration of the tax, the commissioner may require filing of the returns and payment of the tax for other than quarterly or annual periods."

[2] The fact that Treasury didn't get around to recording (or "assessing") in its books of account the amount of the liability until October 18, 2005, two months after Ford claimed a refund, does not change the fact that

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This is the same process that occurs when an individual files an income tax return showing an amount due and a credit for estimated payments. The taxpayer's estimated payments are not a "deposit," they're payments. Treasury subsequently records in its books of account the amount due on the taxpayer's return as a liability and the estimated tax payments as a payment of the liability. And it shows the payment as satisfying the amount due *as of the date the return is filed*. For that reason, the taxpayer does not owe deficiency interest for the period between the date that the return is filed and the date on which Treasury gets around to entering the liability in its books and applying the estimated tax payments as a credit.

Treasury points to an August 25, 2006 letter in which Ford—notifying Treasury that it intended to withdraw its request for an informal conference—asked Treasury to "confirm," by countersigning the letter, that the taxes had been paid and that "the Department recognizes that the application of the deposit shall be considered a 'payment under protest[.]'" (App 130a; emphasis added.) Treasury says this must mean Ford had not previously paid the tax. (Treasury's Br at 22.) Not true. Ford had already paid the tax—Treasury's own documents confirm this (*see* App 133a, 137a-138a)—and asking Treasury to "confirm" that the taxes had been paid means the taxes had already been paid, not that they were yet to be paid. And referring to these payments as "amounts on deposit" did not change the fact that these were tax payments that had already been credited against the liability claimed due.

E. A taxpayer does not have to make a payment "under protest" to make a claim for refund under MCL 205.30.

Treasury argues that a taxpayer must make a payment "under protest" to make a claim for refund under MCL 205.30. (Treasury's Br at 9.) Treasury conflates the requirements of an audit-deficiency

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Ford had already paid this amount. (App 137a-138a.) MCL 205.30(3) provides that overpayment interest begins to run 45 days after the taxpayer makes a "claim" for refund; not from when Treasury clicks a button in its system to enter an amount due as an "assessment" of tax. Otherwise, Treasury could simply drag its feet in "assessing" the tax—all the while holding the taxpayer's money and depriving the taxpayer of its use—to delay the onset of having to pay interest.

procedure under MCL 205.22(2), which requires a taxpayer to pay the tax under protest if the taxpayer plans to file an action in the Court of Claims to recover the tax, with the requirements of a refund-claim procedure under MCL 205.30, which does not. MCL 205.30 contains no requirement that the taxpayer pay the tax under protest—all a taxpayer has to do is "petition" or make a "claim" for refund. Indeed, a taxpayer cannot make its estimated tax payments "under protest," because at the time the estimates are made, no liability has been determined. Treasury offers no reason to read this extra requirement into the statute, and the Court should decline Treasury's invitation to do so.

II. IN THE ALTERNATIVE, FORD PETITIONED OR MADE A CLAIM FOR REFUND ON NOVEMBER 17, 2005

Treasury concedes that Ford's November 17, 2005 request for an informal conference "identified specific (and current) disputed items." (Treasury's Br at 21.) Thus, if there were any shred of doubt left at Treasury regarding the specific refund claim Ford had made and the specific disagreement underlying it, all doubt was gone by November 17, 2005.

Treasury's response is that this still wasn't a refund claim because "the tax had yet to be paid, so no refund was possible." (Treasury's Br at 21.) As shown above, the tax had been paid—long before November 17, 2005. Treasury also argues that Ford withdrew the request for an informal conference and thereby abandoned its claim for refund—"Treasury could not issue a refund because there was no pending refund claim." (*Id.* at 23.) But withdrawing a request for a conference with Treasury to *talk* about the refund claim is not the same as withdrawing the refund claim itself. And there was no confusion that Ford was doing the former and not the latter. Treasury did not act on Ford's request for a conference, so Ford told Treasury it was withdrawing the conference request but proceeding to "file an action in the Court of Claims on the unresolved issues." (App 129a.) And after Ford withdrew its request for an informal conference, Treasury issued a Final Audit Determination Letter denying Ford's refund claim. (App 117a.) If

Ford's withdrawal of its request for an informal conference withdrew the refund claim, then there would be no reason for Treasury to deny the (non-existent) claim.

Finally, Treasury argues that Ford's statement in its request for an informal conference that the Bill for Taxes Due (Intent to Assess) was inconsistent with the audit determination letter, thus somehow showing that Ford did not file a refund claim. (Treasury's Br at 21.) All Ford pointed out was that the tax amount that Treasury claimed was due, $19,742,347, was different from the tax amount billed, which, in total, was $22,129,638. Ford was telling Treasury that Treasury made a mistake in computing the tax bill. That Treasury made a mistake is clear because Treasury cannot bill for more tax than is assessed. Treasury corrected its billing error. (App 135a.) One would have thought that Treasury's systems tie-bar the assessed amount with the billed amount, but apparently they do not.

The Court should reverse the Court of Appeals' decision and reinstate the decision of the Court of Claims.

Respectfully submitted,

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