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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BRIEF ON APPEAL – APPELLANT FORD MOTOR COMPANY

ORAL ARGUMENT REQUESTED

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STATEMENT OF BASIS OF JURISDICTION

On September 25, 2013, the Supreme Court granted leave to appeal to plaintiff-appellant, Ford Motor Company ("Ford"), from a decision of the Court of Appeals dated February 26, 2013. The jurisdiction of the Supreme Court is based on MCR 7.301(A)(2); MCL 205.22(3). The jurisdiction of the Court of Appeals was based on MCL 205.22(3); MCL 600.6446(1), which permitted defendant-appellee, Department of Treasury ("Treasury"), to appeal by right to the Court of Appeals from a decision of the Court of Claims, the jurisdiction of which was based on MCL 205.22(2); MCL 600.6419(1)(a).

STATEMENT OF QUESTIONS INVOLVED

I. For the purpose of calculating overpayment interest on a tax refund under section 30 of the Revenue Act, MCL 205.30 ("Section 30"), did Ford adequately notify Treasury on August 3, 2005 of Ford's tax refund claim if, during the course of Treasury's tax audit of Ford's returns, Ford informed Treasury that Ford disagreed with Treasury's taxation of Ford's contributions to a voluntary employees' beneficiary association ("VEBA") trust and would contest it, which disagreement Treasury duly recorded in its Audit Report of Findings, and if, on August 3, 2005, Ford filed with Treasury Ford's written disagreement with Treasury's audit determination on a form that Treasury provided and in the manner that Treasury directed?

Ford says that the answer is "yes."

Treasury says that the answer is "no."

The Court of Appeals answered "no."

II. Alternatively, for the purpose of calculating overpayment interest under Section 30, did Ford adequately notify Treasury on November 17, 2005 that Ford claimed a refund of the tax that Treasury imposed on the VEBA contributions when on that date Ford filed with Treasury a request for an informal conference, stating in the request that it disagreed with the imposition of tax on the VEBA contributions because the VEBA contributions were not taxable "compensation" as defined in the Single Business Tax Act?

Ford says that the answer is "yes."

Treasury says that the answer is "no."

The Court of Appeals answered "no."

III. Did Ford withdraw its refund claim when, a year later, Ford withdrew its pending request for an informal conference so that it could file a refund action in the Court of Claims, when MCL 205.21(2)(d) and MCL 205.21a treat a refund claim as surviving withdrawal of an informal conference request and require Treasury to act on the claim following the conference request withdrawal?

Ford says that the answer is "no."

Treasury says that the answer is "yes."

The Court of Appeals answered "yes."

OVERVIEW

The question presented by this case is the amount of overpayment interest that Treasury owes Ford on a tax refund. The tax refund itself is no longer in dispute and has been paid to Ford by Treasury. The amount of overpayment interest due is governed by a statute, section 30 of the Revenue Act, MCL 205.30 ("Section 30"), which provides that interest begins to run 45 days after the overpaying taxpayer makes a "claim for refund" or "petitions . . . for refund." The parties both agree that these terms simply require a taxpayer to provide "adequate notice" to Treasury that the taxpayer claims a refund. (*See* Treasury's Br. in Opp. to App. for Leave to Appeal at 2.) Ford provided adequate notice to Treasury that it claimed a refund no later than August 3, 2005.

The dispute between Ford and Treasury related to taxation of contributions that Ford made to its sponsored VEBA trust under Michigan's now-repealed Single Business Tax Act. In its tax returns for the years 1997 through 2001, Ford treated distributions *from* the trust to Ford as compensation subject to tax, but did not treat its contributions *to* the trust as compensation subject to tax. Treasury conducted an extensive audit of Ford's returns that spanned over three years. It was a cooperative effort, and during the

audit Treasury and Ford exchanged considerable information supporting their respective positions, including audit work papers showing Treasury's determination that Ford's contributions to its VEBA trust *were* compensation subject to tax.

In mid-2005, Treasury issued an Audit Report of Findings. The Report detailed for each tax year the specific dollar adjustment Treasury believed was appropriate to reflect the change in treatment of the VEBA contributions. Treasury expressly recorded in the Audit Report of Findings that "The taxpayer disagrees with the audit determination that payments to the VEBA . . . were compensation for SBT purposes." Treasury then issued an Audit Determination Letter on August 3, 2005. Leaving no doubt about the disagreement and Treasury's notice of it, Treasury asked Ford to check a line on the Letter indicating whether Ford agreed or disagreed with the Audit Determination. On August 3, 2005, Ford responded that it "disagrees with this determination."

Thus, no later than August 3, 2005, Treasury had adequate notice that Ford disagreed with Treasury's determination of the tax due. The amounts Treasury claimed were due were already on account at Treasury, because Ford had previously made estimated tax payments that well exceeded its tax liabilities and Treasury had agreed to apply those funds to any future tax liabilities. So the end result of the VEBA audit was that Treasury simply kept Ford's money. Thus, when Ford expressly informed Treasury that it disagreed with Treasury's determination that Treasury was entitled to retain this money, it was no secret to anyone that what Ford wanted was its money back. Ford wanted a refund. Ford wanted a refund of the specific funds Treasury had improperly retained as a result of the VEBA adjustment. Treasury had "adequate notice" of this fact, and under the plain language of Section 30, Ford therefore made a "claim" or "petition" for a refund as of August 3, 2005. Interest accrued on the refund starting 45 days from August 3, 2005, and the amount owed to Ford for unpaid interest is over $1.3 million.

In the alternative, if there were any remaining doubt at Treasury whether Ford was claiming a refund on August 3, 2005, that doubt was erased on November 17, 2005. On that date, Ford expressly

requested in writing a conference with Treasury *for the express purpose of contesting Treasury's VEBA audit adjustment*. The request stated that Ford disagreed with the taxes resulting from the audit and specifically disagreed with the VEBA audit adjustment. Thus, in the alternative, no later than November 17, 2005, Treasury had notice that Ford was claiming a refund. Unpaid interest accruing 45 days from that date would total over $1.1 million.

Despite Ford's clear and repeated notice to Treasury that it disagreed with Treasury's determination of the tax due, the Court of Appeals reversed the decision of the Court of Claims and held that Ford did not give Treasury adequate notice and thus did not make a "claim for refund" or "petition . . . for refund" until it *formally filed suit* in the Court of Claims over a year later, on December 12, 2006. Treasury argues that the overpayment interest it owes to Ford did not begin to accrue until 45 days after that date.

It defies logic, common sense, the record, and the statutory text to hold that Treasury had anything less than *overwhelming* notice that Ford claimed a refund as of August 3, 2005.

Treasury also argues that Ford abandoned its claim for refund by withdrawing its request for an informal conference in September 2006. The argument is meritless. Ford withdrew its request for an informal conference because Treasury failed to timely schedule the conference. And Ford expressly stated in its letter withdrawing the request that the reason it was doing so was *not* because it no longer claimed a refund, but rather because Ford planned to "*file an action in the Court of Claims* on the unresolved issues."

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

STATEMENT OF FACTS

A. The VEBA Trust Tax Audit

In 1997, Ford created a VEBA trust [App. 6, pp 157a-184a, Tab A] and made contributions to the VEBA trust in 1997 through 2001. [App. 6, pp 203a-204a, Tab C, Audit Report of Findings, pp 7-8] In 1998 through 2001, Ford took distributions from the VEBA trust to pay employee benefits.

Ford timely filed Michigan single business tax returns for tax years 1997 through 2001. [App. 6, p 198a, Tab C Audit Report of Findings, p 2] The single business tax taxed employee "compensation." Compensation included wages and benefits paid to employees and retirees. MCL 208.4(3). Ford's single business tax returns treated the VEBA distributions – the remittances by the trust to Ford for the benefit of retirees – as benefits subject to tax. Ford's returns did not treat the VEBA contributions – remittances by Ford to the trust – as subject to tax. [Tab C, Audit Report of Findings, pp 7-8, Appendix 6, pp 203a-204a]

In early 2002, Treasury began an audit of Ford's single business tax returns for 1997 through 2000. Treasury later added Ford's 2001 return to the audit. During the audit, Treasury reviewed the VEBA trust documents [App. 6, pp 157a-184a, Tab A] and the amounts of the VEBA contributions and distributions. [App. 6, pp 203a-204a, Tab C, Audit Report of Findings, pp 7-8] During the audit, Treasury provided audit work papers to Ford showing the VEBA contributions as benefits subject to tax. [App. 5-B, pp 141a-142a, Tab I] Ford informed Treasury that Ford disagreed with treating the VEBA contributions as taxable and that the proper treatment was to tax the distributions as Ford had consistently done in its tax returns. [App. 6, pp 219a-220a, Tab C, pp 23-24] Treasury rejected Ford's argument, finalizing the audit with the VEBA contributions as taxable. [App. 5-B, pp 99a-102a, Tab A]

B. Treasury's Knowledge of Ford's Specific Disagreement with the Audit Determination

In mid-2005, Treasury prepared an Audit Report of Findings. [App. 6, pp 203a-204a, 219a-220a, Tab C, pp 7-8, 23-24] The Report was detailed, listed for each tax year the additional tax Treasury claimed

was due, and expressly recorded Ford's disagreement that the payments to VEBA were taxable compensation:

> [T]he auditors were convinced that FMC's [Ford's] contributions to the VEBA – to the extent deducted on the Federal Income Tax return – constituted compensation for SBT. Accordingly, the audit recorded an adjustment to "Other Benefits" in the amounts of $1,590,000,000, $1,700,000,000, $2,287,000,000, $909,427,035, and $1,000,000,000 for the years 1997, 1998, 1999, 2000, and 2001.
>
> **Contested Audit Issues**:
>
> **The taxpayer [Ford] disagrees with the audit determination that payments to the VEBA (See Compensation) were compensation for SBT purposes.** The tax effect on this audit for VEBA adjustments were as follows:

Year	Amount
1997	$5,116,948
1998	$1,024,529
1999	$2,212,731
2000	$(951,453)
2001	0

> Supervisor's note: The audit does not have to be assessed. **However, the taxpayer does want to request a hearing on the contested issue.** Taxpayer has been informed to send a letter directly to the Office of Hearings, in Lansing to Request a hearing.
>
> Revised note: The audit was assessed for the full amount of the deficiency before application of payment. [Emphasis added.]

On August 3, 2005, after Treasury completed its audit and made its findings, Treasury issued an Audit Determination Letter to Ford. [App. 5-B, pp 99a-102a, Tab A] The Audit Determination Letter, consistent with the Audit Report of Findings, taxed the VEBA contributions. [*Id.*] The Audit Determination Letter stated, in pertinent part, the following:

> Audit Determination
>
> Audit Period: 12 [sic] /01/1997 to 12/31/2001

Net Tax Due	$19,742,347
[Deficiency] Interest	1,641,958
Penalty	0
Total Amount Due	$21,384,305

The Audit Determination Letter further stated that Ford "has reviewed the determination as listed above and received a copy of the audit work schedules." Immediately below, Treasury asked Ford to indicate whether it "agrees with this determination" or "disagrees with this determination."

On August 3, 2005, Ford's representative put an "x" on the line "disagrees with this determination":

Taxpayer: ____ agrees with this determination.
X disagrees with this determination.

Ford's representative signed the letter, dated it August 3, 2005, and sent a facsimile to Treasury on that date. *Id.*

On August 12, 2005, nine days after Ford served Treasury with Ford's express disagreement with the Audit Determination, Ford's representative wrote to Treasury again, disagreeing with Treasury's taxation of the VEBA contributions and arguing that the VEBA contributions were not taxable. On September 19, 2005, Stan Weber, Assistant Administrator of Treasury's Audit Division, rejected Ford's argument, stated his reason for doing so, and encouraged Ford to pursue its legal remedies if it remained in disagreement. [App 6, pp 194a-195a, September 19, 2005 letter from Weber to Ford]

Ford had made estimated single business tax payments for tax year 1999 in excess of its 1999 single business tax liability. The excess estimated tax payments were available for application to a Ford tax liability as of April 30, 2000, the due date of the 1999 single business tax return. Rather than having the estimated tax payments refunded, Ford left the funds with Treasury on account. On April 30, 2002, Treasury agreed in writing that it would apply the April 30, 2000 money to any future underpayment of tax by Ford. [App. 5-B, pp 111a-112a, Attachment 1 to Tab B] When Treasury issued its Audit Determination Letter on August 3, 2005 showing an amount due of $21,284,305, for the audit, Treasury had more than enough of Ford's money to satisfy the amount shown due, and Treasury retained those funds. On October 18, 2005, Treasury assessed Ford for the total amount due and applied Ford's prepayments to satisfy the assessment. [App. 5-B, pp 136a-138a, Tab G]

C. Ford's Request for an Informal Conference

On November 17, 2005, Ford served Treasury with a request for an informal conference. [App. 5-B, pp 146a-150a, Tab K] The request again informed Treasury that Ford disagreed with all the adjustments giving rise to the additional tax and deficiency interest and specifically disagreed with the VEBA audit adjustment as follows:

> VEBA Contributions (Ford Motor and Ford Credit): The audit adjustments inappropriately included in compensation the amounts paid to the Taxpayer's Voluntary Employees' Beneficiary Association (VEBA). The amounts paid to the VEBA do not constitute compensation as defined in MCL 208.4.

By August 25, 2006, Treasury had not scheduled the conference. On that date, Ford sent a letter to Treasury withdrawing its informal conference request. [App. 5-B, pp 129a-131a, Tab D]. The letter stated in pertinent part:

> It is our intention to withdraw our case from Informal Conference and file an action in the Court of Claims on the unresolved issues.

Ford also wrote to the informal conference division on September 19, 2006, withdrawing the request for the informal conference. [App. 27, pp 371a-372a]

In response to Ford's August 25, 2006 letter, Treasury issued a final audit determination letter on September 15, 2006. [App. 5-B, p 117a, Attachment 3 to Tab C]

D. Procedural History

Ford filed suit in the Court of Claims on December 13, 2006 [App. 5-A] requesting a refund of the tax and deficiency interest paid for the VEBA audit adjustment, plus overpayment interest. The Court of Claims held for Treasury on the substantive tax issue. Ford appealed the decision of the Court of Claims to the Court of Appeals, which reversed, deciding that the VEBA contributions were not subject to single business tax. The Court of Appeals remanded the case to the Court of Claims for further proceedings. *Ford Motor Company v Department of Treasury*, 288 Mich App 491; 794 NW2d 357 (2010).

On remand, Ford sought payment of the refund plus overpayment interest beginning 45 days after August 3, 2005. [App. 5-B, pp 71a-98a] Treasury disputed both the amount of overpayment interest to which Ford was entitled and the amount of deficiency interest that Treasury should refund to Ford.[1]

On October 6, 2011, the Court of Claims ordered Treasury to pay Ford the unremitted portion of the deficiency interest [App. 3-A, pp 21a-24a] that Ford had paid for the VEBA audit adjustment plus overpayment interest commencing 45 days after August 3, 2005 that Treasury had not paid.

Ford also sought an award of attorney fees. [App. 4, p 50a (Transcript, p 44)] Treasury objected to the allowance of attorney fees absent a showing of the reason for award and proof of the amount. Following a hearing on the allowance of attorney fees, Treasury and Ford agreed that reasonable attorney fees were $35,000 for the work performed by Ford's counsel. Treasury reserved the right to challenge whether an award of attorney fees was appropriate. [App. 3-B, pp 25a-27a, Court of Claims Order, February 6, 2012]

Treasury appealed. The Court of Appeals held for Treasury on the allowable amount of overpayment interest and for Ford on the refund amount of deficiency interest. [App. 3-C, pp 28a-36a] Because the Court of Claims failed to state its reasons for the award, the Court of Appeals remanded that issue for further consideration [App. 3-C, pp 35a-36a]

Ford filed an application for leave to appeal, which this Court granted. [App. 7, p 224a]

- Ford's appeal does not include the amount of deficiency interest that Treasury is required to refund to Ford. The Court of Appeals agreed with Ford on the amount of the refund of deficiency interest. Treasury did not appeal the decision of the Court of Appeals on the deficiency interest issue.

E. Amounts Owed to Ford by Treasury

If this Court decides that Ford filed its refund claim on August 3, 2005, then Treasury should refund $1,363,364.74 plus interest. If this Court decides that Ford filed its refund claim on November 17, 2005, then Treasury should refund $1,119,240.00 to Ford plus interest. [App. 29, p 377]

STANDARD OF REVIEW

Issues I and II require an interpretation of the terms, "petition . . . for refund" and "claim" in Section 30 of the Revenue Act. Issue III requires an interpretation of Section 21(5) of the Revenue Act, MCL 205.21(2)(d), which directs Treasury to issue a decision and order on a refund claim if a taxpayer withdraws its request for an informal conference. Issues of statutory interpretation are questions of law, which this Court reviews de novo. *Krohn v Home-Owners Ins Co,* 490 Mich 145, 155; 802 NW2d 281, 288 (2011).

ARGUMENT

I. FORD'S RESPONSE TO TREASURY'S AUGUST 3, 2005 AUDIT DETERMINATION WAS A "PETITION" OR "CLAIM" FOR REFUND FOR PURPOSES OF THE CALCULATION OF OVERPAYMENT INTEREST UNDER SECTION 30

A. The Statute: MCL 205.30 Provides that Overpayment Interest Begins to Run 45 Days from the Date the Taxpayer Makes a "Claim" or "Petition" for Refund

The central dispute in this case is the date on which Ford made a "claim for refund" or "petition . . . for refund" under Section 30 of the Revenue Act, MCL 205.30. Section 30 in pertinent part provides:

> 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. If the department agrees the claim is valid, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in section 30a, and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability.

If the refund claim is granted, interest on the overpayment of tax and related deficiency interest begins to accrue 45 days after the taxpayer made a claim or petition for refund with Treasury:

> 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. Interest on refunds intercepted and applied as provided in section 30a shall cease as of the date of interception. Refunds for amounts of less than $1.00 shall not be paid. MCL 205.30.

Thus, if a taxpayer makes a "claim" or "petitions" for a refund, and ultimately is successful on the claim, the taxpayer is entitled to the refund plus overpayment interest accruing 45 days after the claim is made.

B. The Plain Language of the Statute Demonstrates that a Taxpayer Makes a "Claim" or "Petition" for Refund By Giving Treasury Adequate Notice that the Taxpayer Seeks a Refund

The parties both agree that the plain and unambiguous language of Section 30 requires a taxpayer simply to provide "adequate notice" to Treasury that the taxpayer seeks a refund. *See Fisher Sand & Gravel Co v Neal A. Sweebe, Inc,* 494 Mich 543, 560; 837 NW2d 244 (2013) ("When ascertaining the Legislature's intent, a reviewing court should focus first on the plain language of the statute in question, and when the language of the statute is unambiguous, it must be enforced as written"). Treasury concedes that, "[c]learly, 'petitioning' Treasury for a refund does not require a court filing or the filing of a tax return." (Treasury's Br. in Opp. to App. for Leave at 10.) "The claim need not have sufficient information to prove entitlement, but it must give Treasury adequate notice . . . ." (*Id.* at 8.) The Court of Appeals likewise applied an "adequate notice" standard, following its earlier decision in *Lindsay Anderson Sagar Trust v Dep't of Treasury,* 204 Mich App 128, 132; 514 NW2d 514 (1994), which held that "a claim is filed when defendant receives adequate notice of the claim." [Court of Appeals' Opinion at 5; "A claim for a refund is considered filed on the date the defendant is adequately notified of the claim."]

Under the plain and unambiguous language of Section 30, then, and as interpreted by the parties and the Court of Appeals, overpayment interest began to accrue 45 days after Ford provided "adequate notice" to Treasury that it sought a refund.[2] The dispute is the date on which Ford provided that notice to Treasury.

C. Ford Gave Treasury Adequate Notice that It Claimed a Refund Was Due And Thereby Made a "Claim" or "Petition" for Refund Under the Plain Meaning of Section 30, No Later than August 3, 2005

Ford gave Treasury adequate notice that it claimed a refund no later than August 3, 2005. Ford did so expressly, unambiguously, and in writing.

Ford filed tax returns for the years 1997 through 2001 in which it calculated an amount due for tax payments related to Ford's VEBA trust. [App. 6, p 197a, Tab C, p1.] Ford thereby told Treasury *precisely* the amounts Ford believed were due for each tax year. Ford did not treat contributions it made into its VEBA trust as compensation subject to tax in calculating these amounts. [*Id.*] Treasury then conducted an audit of those tax returns, and Treasury issued a report detailing the amount of tax *Treasury* claimed was due for each tax year. Treasury claimed in its Audit Report of Findings that VEBA contributions *were* compensation and subject to tax. Specifically, Treasury wrote that "the auditors were convinced that [Ford's] contributions to the VEBA – to the extent deducted on the Federal income tax return – constituted compensation for SBT." [App. 6, pp 203a-204a, 219a-220a, Tab C, pp 7-8, 23-24.] Treasury recorded the

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[2] This reading of "petition" and "claim" for refund is consistent with the terms' plain dictionary definitions. The plain and ordinary meaning of "petition," as a verb, which is the usage in Section 30, is "to beg or request something." The plain and ordinary meaning of "claim" as a noun, which is its usage in Section 30, means "a demand for something as due." [App. 8, pp 225a-228a, Random House Unabridged Dictionary] Under the plain and ordinary meaning of Section 30, therefore, a taxpayer "petitions" for or makes a "claim" for refund quite simply when it requests or demands a refund from Treasury. This also squares with other text in the statute. *See People v Peltola*, 489 Mich 174, 181; 803 NW2d 140, 144 (2011) (the words of a statute should be read harmoniously). The Legislature provided an example in Section 30 of what action by a taxpayer would constitute a "claim for refund" under the statute: "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." Thus, a simple statement on a taxpayer's tax return that the return reflects an overpayment is a "claim for refund" within the meaning of Section 30.

specific dollar amounts of the adjustment: "Accordingly, the audit recorded an adjustment to 'Other Benefits' in the amounts of $1,590,000,000, $1,700,000,000, $2,287,000,000, $909,427,035, and $1,000,000,000 for the years 1997, 1998, 1999, 2000, and 2001." [*Id.*]

Under the heading "Contested Audit Issues" in the Audit Report of Findings, Treasury expressly acknowledged Ford's disagreement that VEBA contributions were compensation subject to tax: "The taxpayer disagrees with the audit determination that payments to the VEBA . . . were compensation for SBT purposes." [App 6, pp 219a-220a, Tab C, pp 23-24] Treasury therefore, by its own pen, knew that Ford specifically contested Treasury's determination that contributions to the VEBA trust were compensation, and knew that Ford claimed a refund of those specific taxes.

Under the same heading, "Contested Audit Issues," Treasury also listed, for each tax year, the specific adjustment to Ford's tax bills:

> The tax effect on this audit for VEBA adjustments were as follows:

Year	Amount
1997	$5,116,948
1998	$1,024,529
1999	$2,212,731
2000	$(951,453)
2001	0

Treasury therefore knew the precise amounts – for each tax year – that Treasury would add to or subtract from Ford's tax bills. And because Treasury expressly noted that these amounts were "Contested," Treasury knew that Ford disagreed that Treasury should make these adjustments. For 1997, for example, Treasury knew that Ford specifically disagreed that its tax bill should go up by "$5,116,948." For 1998, Treasury knew that Ford specifically disagreed that its tax bill should go up by "1,024,529." And so on for each of the listed tax years.

On August 3, 2005, Treasury issued a Final Audit Determination Letter. To leave no doubt as to Ford's position on Treasury's determination that VEBA contributions were compensation subject to tax, and

on Treasury's specific VEBA tax adjustments for the years 1997 through 2001, Treasury asked Ford to acknowledge that it had "reviewed the determination as listed above and received a copy of the audit work schedules," and to indicate whether it "agrees with this determination" or "disagrees with this determination." Ford on the same day, August 3, 2005, put an "x" on the line, "disagrees with this determination," signed the letter, and sent it back to Treasury:

Taxpayer: ____ agrees with this determination.
X disagrees with this determination.

The amounts Treasury claimed were due were already on account at Treasury. Ford had previously made estimated tax payments that well exceeded its tax liabilities, and Treasury agreed to apply those funds to any future tax liabilities. [App. 5-B, pp 111a-112a, Attachment 1 to Tab B] So the end result of the VEBA audit was that Treasury simply kept Ford's money, despite Ford's express statement on August 3, 2005 that it "disagree[d]" that Treasury was permitted to do so. On October 18, 2005, Treasury recorded in its books of account the total amount Treasury claimed was due and its application of Ford's prepayments to satisfy the amount claimed due. [App. 5-B, pp 136a-138a, Tab G]

Thus, as of August 3, 2005, Treasury knew the following: Treasury knew that Ford had filed tax returns for the tax years 1997 through 2001 that told Treasury precisely the amounts Ford believed were due for each tax year. Treasury knew that Ford did not treat VEBA contributions as compensation subject to tax in calculating these amounts. Treasury knew that it issued an Audit Report of Findings to Ford that claimed VEBA contributions were compensation subject to tax. Treasury knew that it told Ford the specific dollar amounts Treasury claimed were due for each tax year as a result of Treasury's VEBA adjustments. Treasury knew that it had Ford's money on account to cover those specific amounts. Treasury knew that Ford disagreed that these amounts were properly taxable: "The taxpayer disagrees with the audit determination that payments to the VEBA . . . were compensation for SBT purposes." [App. 6, p. 219a, Tab

C, p. 23] Treasury knew that Ford disagreed with Treasury's final audit determination: Ford "__X__ disagrees with this determination." [App. 5B, pp 100a-102a]

To say the least, then, Treasury had "adequate notice" as of August 3, 2005 that Ford disagreed with Treasury's adjustments to its tax bill, and that Ford thus claimed a refund of those specific improperly adjusted amounts. The notice was clear, specific, and unequivocal. Simply put, Treasury had Ford's money, and Ford told Treasury it wanted its money back.

Indeed, Treasury acknowledged that it had adequate notice that Ford disagreed with the VEBA adjustments and claimed a refund. On August 12, 2005, nine days after Ford served Treasury with Ford's express disagreement with the Audit Determination, Ford's representative wrote to Treasury again disagreeing with Treasury's taxation of the VEBA contributions and arguing that the VEBA contributions were not taxable. On September 19, 2005, Stan Weber, Assistant Administrator of Treasury's Audit Division, rejected Ford's argument, stated his reason for doing so, and encouraged Ford to pursue its legal remedies if it remained in disagreement. [App 6, pp 194a-195a, September 19, 2005 letter from Weber to Ford.] Treasury thus *admitted* that it had adequate notice that Ford claimed a refund of the improperly assessed VEBA adjustments.

D. Well-Developed Federal Tax Law Provides Guidance on the Adequacy of a Taxpayer's Notice of a Refund Claim, and Confirms that Ford's Notice to Treasury Was Adequate

The federal courts have developed a body of law that provides guidance about what constitutes adequate notice of a refund claim by a taxpayer to a taxing authority. This body of federal tax law is instructive for purposes of Michigan law, *cf Molter v Dep't of Treasury*, 443 Mich 537, 554; 505 NW2d 244, 252 (1993), and this Court should adopt and apply the federal standards here.

Federal tax law instructs that to file a refund claim the taxpayer simply has to "fairly advise" the IRS of the nature of the claim. In *Sumrall v. Commissioner*, TCM 2002-78 (TC 2002), the United States Tax Court said the following:

> It is well established that an informal claim for refund (i.e., one that does not comply with the formal requirements of the statute and regulations) will suffice as long as it requests a refund and *fairly advises respondent of the nature of the taxpayer's claim. United States v. Kales,* 314 U.S. 186, 194, 62 S Ct 214, 86 L.Ed. 132 (1941). As we summarized in *Turco v. Commissioner,* T.C. Memo.1997–564: There are no bright line rules as to what constitutes an informal claim. Rather, each case must be decided on its own particular set of facts. *The relevant question is whether respondent knew or should have known that a refund claim was being made.* [Emphasis added]

See also First Nat Bank of Fayetteville, Ark v United States, 727 F2d 741, 744 (8th Cir 1984). As the United States Supreme Court stated decades ago in *Tucker v Alexander,* 275 US 228, 231; 48 SCt 45, 46; 72 LEd 253 (1927):

> The informal claim doctrine was developed for precisely this instance when the entire basis of the plaintiff's refund claim was within the knowledge of the IRS from the very beginning. Any other result in this case would relegate IRS rules into "traps for the unwary" not procedures established "for the convenience of government officials in passing upon claims for refund and in preparing for trial."

The taxpayer "fairly advises" the IRS of the nature of the claim if the refund claim has (i) a written component, (ii) notice that the taxpayer is asserting a right to a refund, and (iii) a description of the legal and factual basis for the refund. *New England Elec Sys v United States,* 32 Fed Cl 636, 641 (1995). The focus is on the claim as a whole. *New England Elec Sys,* 32 Fed Cl 641; *see also Angelus Milling Co v Commissioner,* 325 US 293, 297-98; 65 S Ct. 1162, 1165; 89 L Ed 1619 (1945) ("The Commissioner's attention should have been focused on the merits of the particular dispute. The evidence should be clear that the Commissioner understood the specific claim that was made even though there was a departure from form in its submission.")

The written component may be produced by the taxing authority itself. When oral statements of a taxpayer are documented in written form by IRS personnel, the requirement of a written component is satisfied. *See,* e.g., *Newton v United States,* 143 Ct Cl 293, 301; 163 FSupp 614, 619 (1958) (indicating that the court considered an IRS memorandum as part of an informal claim). In *Faria Corp v United States,* 39 AFTR 2d 77-1682 (Tr Div Ct Cl 1977) [App. 20, pp 308a-332a], the Federal Court of Claims stated that "[s]ince the written component requirement is to insure that the IRS has some memorandum which it can

file, it need not be a writing created by the taxpayer, but may be an internal IRS memorandum recording what the taxpayer stated he intended to do." [App. 20, p 322a] *Faria* was cited with approval by *New England Elec Sys v United States*, 32 Fed Cl 644 (Fed Cl 1995), as follows:

> While Faria is not precedent for this Court, its logic and assessment of the law are compelling, and this Court agrees with its conclusion. As has been stated numerous times, the primary purpose of the written component of an informal claim is in recognition of the fact that Government personnel are constantly changing, and, as such, some continuity of notice must be provided. *Furst v. United States*, 230 Ct Cl 375, 380, 678 F2d 147, 151 (1982). This Court believes that written statements made either by the taxpayer himself or by IRS personnel serve this purpose. In both instances, the purpose of putting future IRS personnel on notice of a claimed right by the taxpayer is served.

See also Mobil Oil Corp v United States, 991 F2d 811 (Fed Cir 1993) [App. 21, pp 333a-337a] ("A valid informal refund claim requires a showing (1) that the Commissioner was on either actual or constructive notice that a right was being asserted with respect to an overpayment of tax for a certain year and (2) that there exists some sort of written component, whether created by the taxpayer or the IRS").[3]

Thus, under federal tax procedure, a taxpayer provides adequate notice to the IRS of a refund claim if it "fairly advises [the IRS] of the nature of the taxpayer's claim." That standard is met if the taxpayer asserts a right to a refund that describes the legal and factual basis of the claim, and if the notice contains a written component, including written statements by the IRS. The ultimate question is whether the IRS "knew or should have known that a refund claim was being made." *Sumrall v. Commissioner*, TCM 2002-78 (TC 2002).

Ford met those standards here. Treasury "knew or should have known that a refund claim was being made." Ford "fairly advised" Treasury of the legal and factual bases for its claim – Ford's position

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[3] In *New England Electric*, the Court of Federal Claims treated as part of the written component (1) an IRS Form 5701 dated July 1984 stating "[d]o not agree to fish ladder ITC. Everything else is agreed to" and signed by Mr. Palmer [the taxpayer's representative]; (2) IRS agent Mason's RAR dated November 30, 1984, stating "T/P reserves the right to file a protective claim relating to the disallowance of the investment tax credit;" and (3) an IRS transmittal report for the tax years 1979–1981 dated November 30, 1984, stating "[t]axpayer accepted the engineer's findings except for the 'fish ladder' that the taxpayer may file a protective claim."

that VEBA contributions were not compensation subject to tax – and Treasury expressly noted Ford's specific disagreement in its Audit Report of Findings. This report satisfies the written component of the claim, as does Ford's written response to the Audit Determination Letter, in which Ford stated expressly that it "disagree[d]" with Treasury's determination of the tax due. [App. 5B, pp 100a-102a]

The Court of Federal Claims' *New England Electric* case is on point. The Treasury's Audit Determination Letter is similar to IRS "Form 5701." The taxpayer in *New England Electric* expressed its disagreement with the audit findings on the Form 5701. Ford expressed its disagreement, among other ways, in the Audit Determination Letter. The IRS also issued a Revenue Agent's Report ("RAR"), which is the federal equivalent of Treasury's Audit Report of Findings. The IRS agent stated in the RAR that the taxpayer reserved the right to file a refund claim and did not accept the IRS's determination of the tax due. This is akin to the statement of Treasury's auditor in Treasury's Audit Report of Findings that Ford disputed taxation of the VEBA contributions and would request an informal conference for that adjustment. In *New England Electric*, the Court of Federal Claims concluded that all three documents were written components of the taxpayer's claim. The Court held that the taxpayer had given Treasury sufficient notice of the refund claim. *See also Levitsky v United States*, 27 Fed Cl 235, 242 (Fed Cl 1992) ("The examination explained in detail the law applicable to the facts of the case. The I.R.S. knew the length of the lease, the length of the useful life, the amount of expenses and the rental income. It is clear, then, that the I.R.S. had all pertinent information in its hands, knew that there was a claim based upon it, and considered the information in reaching the conclusion that the investment tax credit should be disallowed.")

This Court should adopt the well-established federal standards for determining whether a taxpayer adequately notifies Treasury of a claim for refund under Section 30. Federal law confirms that Ford met the standards here and gave adequate notice to Treasury no later than August 3, 2005.

E. The Court of Appeals Erred By Holding that Treasury Did Not Have Adequate Notice that Ford Claimed a Refund

1. The Court of Appeals erred by failing to consider all of the facts demonstrating that Treasury had adequate notice of Ford's claim for refund.

The Court of Appeals held that Ford failed to give Treasury adequate notice that Ford claimed a refund until December 13, 2006, when Ford filed its complaint in the Court of Claims. [Opinion at 6.] The Court reasoned that Ford's "check-the-box response was a statement of such broad disagreement with defendant's determinations that it cannot be considered to adequately notify defendant that plaintiff was claiming a refund." [*Id.*] Ford "did not provide any indication of a specific refund amount," and thus "[b]y checking the box marked 'disagrees with this determination[,]' plaintiff was merely providing defendant with notice that plaintiffs intended to contest the assessment." [*Id.* at 5-6.]

The Court of Appeals erred. Ford did not simply check a box indicating "broad disagreement" with Treasury's audit determination. The audit spanned over three years, with extensive communication between Ford and Treasury, and it was no secret to Treasury precisely the disagreement that Ford had with Treasury's determination – Ford disagreed that its contributions to the VEBA trust were compensation subject to tax. Treasury *expressly* acknowledged that specific disagreement in its Audit Report of Findings: "The taxpayer disagrees with the audit determination that payments to the VEBA . . . were compensation for SBT purposes." [App 6, p 219a, Tab C, p 23]

And Ford *did* provide Treasury an "indication of a specific refund amount." Ford provided Treasury with the specific amounts, for each tax year, that Ford believed were due in its tax returns [App. 6, p. 203a, Tab C, p 7]; then Treasury provided Ford with the specific amounts, for each tax year, that Treasury believed were due [App. 5B, p 142a]; Treasury admitted that it knew Ford disagreed with these specific amounts [App. 6, p 6, p 219a, Tab C, p 23]; Ford expressly informed Treasury that it disagreed with Treasury's determination of the amounts due [App. 5B, pp 100a-102a]; and then Treasury acknowledged

Ford's specific disagreement about the amounts due [App. 6, pp 229a-220a, Tab C, pp 23-14 and Ap. 6, p 194a]

The Court of Appeals erred by failing to consider all of these facts in determining whether Treasury had adequate notice of Ford's refund claim. If a statute provides specific requirements about how to provide notice, then the notice must conform to the specific statutory requirements. *See Rowland v Washtenaw Cnty Rd Comm'n*, 477 Mich 197; 731 NW2d 41 (2007). But Section 30 does not provide any such specific requirements. As Treasury admits, there is no "specific form to fill out, like a tax return," and a claim for refund under Section 30 "does not follow a specific format." [Treasury's Opp. to App. for Leave to Appeal at 2, 8.]

In *NSK Corp v Dep't of Treasury*, 481 Mich 884, 748 NW2d 884 (2008), for example, this Court considered whether a taxpayer's response to an audit determination letter from Treasury was a claim for refund under Section 30 triggering the accrual of overpayment interest. The Court stated 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*." *Id.* (emphasis added). "Pursuant to MCL 205.30(3), 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." *Id.* This Court held that the taxpayer's simple response to Treasury's audit letter, which "agree[d] with the amount of the refund, but demand[ed] interest on the refund," constituted such a "separate request" or "separate claim" and therefore was a "claim for refund" under Section 30. *Id.* The Court held that overpayment interest accrued beginning 45 days from that date, and reversed the Court of Appeals' holding that overpayment interest did not begin to accrue until Treasury "notified the plaintiff that it was entitled to a refund." *Id.*

Ford's notice to Treasury that it claimed a refund was equivalent to or exceeded the notice to Treasury by the taxpayer in *NSK Corp*. The record here demonstrates a lengthy and detailed audit of Ford's VEBA tax liabilities that spanned three years, with communication back and forth between Ford and

Treasury regarding their respective positions on the taxes owed. This communication and specific disagreement about specific tax calculations for specific tax years was recorded by Treasury itself in its Audit Report of Findings. [App. 6, pp 219a-220a, Tab C, pp 23-24] There is no indication of such detailed communication between Treasury and the taxpayer in *NSK Corp.* In short, it was plainly apparent to Treasury here that Ford specifically disagreed with Treasury's calculation of the taxes due, and, just like the taxpayer in *NSK Corp*, Ford (in addition to everything above) expressed its disagreement in response to Treasury's audit letter. In *NSK*, Treasury's audit finding of a refund was accepted as the taxpayer's refund claim when the taxpayer expressly agreed with it. In the same vein, Treasury's Audit Report of Findings became Ford's refund claim when Ford expressly disagreed with it and notified Treasury of that disagreement.[4]

Where a statute does not prescribe specific methods for providing notice, courts consider the totality of the circumstances to determine whether notice was adequate. *See, e.g., In re Treasurer of Wayne Cnty for Foreclosure*, 478 Mich 1, 9; 732 NW2d 458, 462 (2007) (a court considers "all the circumstances" to determine whether a party gives adequate notice); *Chambers v Trettco, Inc*, 463 Mich

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[4] The Court's recent opinion in *Malpass v Dep't of Treasury*, 494 Mich 237; 833 NW2d 272 (2013) is instructive in showing that this Court will not add requirement or limitations, such as specific notice requirements here, that the Legislature did not enact in a tax statute. The issue there concerned the apportionment of business income stemming from business activity both within and outside of Michigan. Treasury argued that the apportionment statute, MCL 206.115, required the taxpayer to apportion the income in a specific way—by computing the income separately for two pass-through entities owned by the business, rather than by combining the income and apportionment data of both entities. This Court rejected Treasury's argument. The Court reasoned that "the statute does not require that any particular method of apportionment be used—it is silent on this question." Thus, Treasury's argument was "self-defeating": "Faced with a statutory provision that is broad enough to encompass both reporting options—but does not choose between them—the Department asks this Court to adopt its preferred methodology. However, we decline this invitation to engage in interstitial rule making because '[t]o supply omissions transcends the judicial function.' Instead, in the absence of a policy choice by the Legislature, we conclude that the ITA [Income Tax Act] permits either reporting method." *Malpass*, 494 Mich 251; 833 NW2d 279; *see also Rohde v Ann Arbor Pub Sch*, 479 Mich 336, 344; 737 NW2d 158, 162 (2007) ("We disagree with the Court of Appeals analysis and conclude that plaintiffs' 'request' was sufficient to satisfy the statute's 'demand' requirement . . . Plaintiffs were not required to use the word "demand." All that is required is a communication that would reasonably be understood as a demand.")

297, 318-19; 614 NW2d 910, 919 (2000) (an "inquiry into the adequacy of the notice" is based on the "totality of the circumstances"); *Detroit Trust Co v Mortensen*, 273 Mich 407, 412, 263 NW 409, 411 (1935) (facts and circumstances test included facts and circumstances predating execution of documents that were the subject of interpretation); *Newton v United States*, 163 F Supp 614, 619 (Ct Cl 1958) ("It made no difference that the informal claim was made prior to the time that the tax was actually paid since the Commissioner knew or should have known that the plaintiff was claiming a refund.")[5]

The Court of Appeals erred by considering only what it called Ford's "check-the-box response," and failed to consider all of the facts and circumstances leading up to and subsumed within that response that demonstrated that Treasury had adequate notice of Ford's claim for refund.

2. The Court of Appeals erred by failing to construe Section 30 in the taxpayer's favor.

The Court of Appeals further erred by failing to follow this Court's long-established rule that any ambiguity in a tax statute is resolved in favor of the taxpayer. *In re Dodge Bros*, 241 Mich 665; 217 NW 777 (1928); *see also Hart v State*, 333 Mich 248; 52 NW2d 685 (1952). If any doubt exists about the meaning of "petition for refund" or "claim" in Section 30, that doubt must be resolved in favor of Ford. *Id.* No reading of Section 30 would support a bright line rule that excludes from the meaning of those terms all

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[5] Indeed, the history of Section 30 confirms that the statute does not require a technical or formal procedure for providing notice to Treasury. Section 30 was added to the Revenue Act by 1980 PA 162, and replaced a repealed section of the Income Tax Act and other tax acts. The repealed section of the Income Tax Act provided expressly that the taxpayer was required to petition Treasury "in writing" to request a refund. *See* 1967 PA 281, enacting MCL 206.441 (a "taxpayer . . . may . . . petition the department *in writing* to refund the amount of tax so paid") (emphasis added), [App. 13, p 280a] which was repealed by 1980 PA 169. The Single Business Tax Act originally also required that a refund claim be "in writing." 1975 PA 228, enacting MCL 208.97(2) (a "taxpayer . . . may . . . petition the department *in writing* to refund an amount so paid") (emphasis added), [App. 15, p 282a]. The "in writing" requirement was repealed in 1985 by 1985 PA 139. [App. 16, pp 284a-286a]. It is presumed that the Legislature intends that a statutory amendment change existing law. *Lawrence Baking Co v Michigan Unemployment Comp Comm'n*, 308 Mich 198, 205; 13 NW2d 260, 262 (1944). Thus, the Legislature intended to make the requirements of Section 30 even *less* formal than they once were—even an oral communication to Treasury can give Treasury adequate notice that the taxpayer seeks a refund.

of the communications between a taxpayer and Treasury that occur during the course of a tax audit. No reading of Section 30 would support a distinction between a refund claim and a contest of an assessment that the taxpayer paid. In both circumstances, Ford's communications expressing disagreement with taxation of the VEBA contributions come within the terms, "petition for refund" and "claim."

3. The Court of Appeals' decision is inconsistent with the rule of lenity.

The canon of statutory construction known as the "rule of lenity" applies because Treasury's interpretation of Section 30 deprives a taxpayer of money. The deprivation is a penalty. When a statute as applied imposes a penalty, the rule of lenity applies to ensure that the statute is read fairly. The rule of lenity "rest[s] on the interpretive reality that a just legislature will not decree punishment without making clear what conduct incurs the punishment and what the extent of the punishment will be." [App. 22, pp 338a-342a, Scalia & Garner, *Reading Law*, (Thomson/West 2012), p 296][6]

The underpinning of the rule of lenity is "fair warning," and the rule has a due-process component. As the United States Supreme Court has stated, "A taxpayer is entitled to know the procedure to apply to claim a refund. If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation." *McKesson Corp v Div of Alcoholic Beverages & Tobacco, Dep't of Bus Regulation of Florida*, 496 US 18, 31; 110 S Ct 2238, 2247; 110 L Ed 2d 17 (1990). The due-process component provides that the government "must provide taxpayers with, not only a fair opportunity to challenge the accuracy and legal validity of their tax obligation, but also a 'clear and certain remedy.'" *Id.* at 39.

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[6] *See* Maura D. Corrigan, J. Michael Thomas, "*Dice Loading" Rules of Statutory Interpretation*, 59 N.Y.U. Ann. Sur. Am. L. 231, 245 (2003). [App. 23, pp 343a-354a] ("Michigan's jurisprudence in recent years has moved away from the use of dice-loading preferential rules, consistent with the mode of statutory interpretation advocated by Justice Scalia.")

The canon should attach to tax statutes and be applied at the outset of textual inquiry before any other rule of interpretation is applied. [Scalia, pp 298, 299] [App. 22, pp 341a-342a] But even if the canon is applied after other legitimate tools of interpretation are applied, if reasonable doubt still persists about the interpretation, the penalty should not be imposed for the reason that "when the government means to punish, its commands should be reasonably clear. When they are not clear, the consequences should be visited on the party more able to avoid and correct the effects of shoddy legislative drafting[.]" [Scalia, p 299, App. 22, pp 342a]

Here, the party more able to avoid and correct any ambiguity in Section 30 is Treasury. It has not done so, despite a legislative directive to explain in simple terms the tax refund procedure. MCL 205.5(1)(c). Treasury issued Revenue Administrative Bulletin 94-6, [App. 24, pp 355a-358a], explaining only that a taxpayer must "adequately notify" Treasury of a refund claim, which provides no guidance at all about *how* to adequately notify Treasury of a refund claim. If there is any doubt about whether the meaning of a refund claim in Section 30 includes facts and circumstances preceding Ford's August 3, 2005 response to the Audit Determination Letter, then application of the rule of lenity leads to the conclusion that these facts and circumstances are part of the claim, and that is the proper result.

4. The Court of Appeals' decision is inconsistent with the Taxpayer Bill of Rights, which expressed the intention of the Legislature that tax procedures be readily comprehensible by all taxpayers.

Tax procedures apply to all taxpayers, large and small, individuals and corporations. Because of their general application, tax procedures are designed to be readily comprehensible. Comprehensibility means that the terms are not to be understood as reflecting any technical legal meaning. *Driver v Naini*, 490 Mich 239 247; 802 NW2d 311, 316 (2011) (examining the plain language of the statute to determine period of limitations). Compare *Silver Creek Drain Dist v Extrusions Div Inc*, 468 Mich 367; 663 NW2d 436 (2003) (technical term understood in its technical sense). Taxpayers understand that they have to file tax returns and pay the tax due. They understand that they may be audited and that an audit may result in an

assertion that they owe more tax. They understand that if they overpay tax, they can file refund claims. The procedures are not esoteric, as a glance at Section 30 makes clear. They are intended to be understood in a common sense fashion so that they are broadly accessible to all taxpayers.

The Legislature wanted assurance that Treasury did not apply tax procedures unfairly. To this end, the Legislature enacted the Taxpayer Bill of Rights, 1993 PA 13 [App. 9, pp 229a-233a] and 1993 PA 14, [App. 10, pp 234a-240a]. The Taxpayer Bill of Rights required Treasury to publish a handbook explaining audit and collection procedures to taxpayers. MCL 205.4(3). The Taxpayer Bill of Rights also required Treasury to prepare a brochure explaining in simple and nontechnical terms a taxpayer's protections and recourses in regard to Treasury's action in administering or enforcing a tax statute, and, specifically relevant to this case, the "procedures for claiming refunds." MCL 205.5(1)(c).

Treasury published the "Taxpayer Rights Handbook" [App. 11, pp 241a-274a] as its response to the Taxpayer Bill of Rights, but the Taxpayer Rights Handbook provides no guidance about how to file a refund claim resulting from an audit adjustment, despite the legislative direction in MCL 205.5 to do so. It is patently unfair for Treasury to argue that Ford did not adequately notify Treasury of its refund claim when, despite the passage of the Taxpayer Bill of Rights twenty years ago, Treasury has not yet responded to the Legislative directive to explain the procedures for claiming a refund.

II. IN THE ALTERNATIVE, FORD'S REQUEST FOR AN INFORMAL CONFERENCE ON NOVEMBER 17, 2005 ADEQUATELY NOTIFIED TREASURY OF ITS CLAIM

If there were any lingering doubt at Treasury whether Ford disagreed with Treasury's determination that VEBA contributions were taxable, it was erased no later than November 17, 2005. That is when, in addition to everything detailed above—Ford's returns, Treasury's audit, Treasury's own report noting Ford's disagreement, Ford's express written notice that it disagreed with Treasury's determination that VEBA contributions were taxable—Ford in writing requested a conference with Treasury for the express purpose of contesting Treasury's determination. Following Ford's disagreement with Treasury's Audit

Determination, Treasury processed the audit and on November 17, 2005, Ford made a timely request for an informal conference. MCL 205.21a [App. 5-B, pp 146a-150a, Tab K]. The request stated that Ford disagreed with adjustments "giving rise to additional tax and [deficiency] interest" and specifically identified the VEBA audit adjustment as a basis for the disagreement.

Even assuming that the facts and circumstances surrounding Ford's disagreement on August 3, 2005 with the Audit Determination did not focus Treasury on Ford's disagreement with the VEBA audit adjustment, Ford's informal conference request cured that assumed defect, so that Ford's refund claim would have been filed no later than November 17, 2005. On that date, Treasury knew all that was knowable about Ford's claim. The amount due for the VEBA audit adjustment was known, Treasury assessed it, and Treasury applied Ford's prepayment to it. Treasury knew that Ford had expressly disagreed with the VEBA audit adjustment and the related tax increase. The sum and substance of these facts and circumstances constituted the filing of a refund claim by Ford no later than November 17, 2005.

The Court of Appeals rejected Ford's informal conference request as a refund claim on the theory that the informal conference request was only a contest of an assessment and was not a refund claim. The Court of Appeals relied on MCL 205.21(5) ("Subsection 5") Subsection 5 for its theory. Subsection 5 provides as follows:

> During the course of the informal conference under subsection (2)(d), the taxpayer by written notice may convert his or her contest of the assessment to a claim for a refund. The written notice shall be accompanied by payment of the contested amount. The informal conference shall continue and the department shall render a decision and issue an order regarding the claim for refund.

The Court of Appeals erred. First, Subsection 5 was not effective during any period relevant in this case. Subsection 5 became effective on February 5, 2006. It was not effective (i) on April 30, 2000 when Ford prepaid the tax in dispute in the instant case, [App. 5-B, p 112a, Attachment 1, Tab C] (ii) on August 3, 2005 when Treasury issued the Audit Determination Letter with which Ford disagreed, [App. 5-B, pp 99a-102a, Tab A] (iii) on October 18, 2005 when Treasury recorded in its books of account an assessment and

satisfaction thereof for the audit determination, [App. 5-B, pp 136a-138a, Tab G] or (iv) on November 18, 2005 when Ford filed its request for an informal conference. [App. 5-B, pp 146a-150a,Tab K] By February 5, 2006, the effective date of Subsection 5, Ford could not pay the contested amount because Treasury had already applied Ford's prepayment to the amount Treasury determined to be due. It was impossible for Ford to turn back the clock to apply Subsection 5, which proves the error of the Court of Appeals in relying on it.

Second, even if Subsection 5 did apply, the Court of Appeals misunderstood and misapplied it. The Legislature enacted Subsection 5 to confirm that a taxpayer that paid a disputed tax had a right to an informal conference with Treasury to challenge the disputed tax. Prior to the enactment, some doubt existed about a taxpayer's right to an informal conference for a disputed refund claim. (See 2002 PA 657, MCL 205.21(2)(c), as then in effect, [App. 25, pp 359a, 362a] which by its terms appeared to limit the right to an informal conference to a disputed deficiency and made no reference to a right to an informal conference for a disputed refund claim.) With its enactment, Subsection 5 assures a taxpayer that it may pay a disputed tax and still have a right to an informal conference. Subsection 5 provided a remedy and should be interpreted to effectuate its remedial intent. *W Michigan Univ Bd of Control, v State*, 455 Mich 531, 546; 565 NW2d 828, 834 (1997). Subsection 5, as erroneously interpreted by the Court of Appeals,

would create a new procedural hurdle, heretofore unknown in tax law, that distinguishes between a contested assessment that a taxpayer paid and a refund claim.[7]

The Court of Appeals' interpretation of Subsection 5 is categorically incorrect. The difference between a contest of an assessment and a claim for refund is determined by answering only one question: *Did the taxpayer pay the disputed tax?* If the answer is "yes," the taxpayer filed a refund claim. There simply is no other logical alternative to an understanding of the sequence of events. If a taxpayer pays a disputed tax and then requests a conference to contest the payment, the taxpayer wants a refund and not an intellectual discussion at a conference with Treasury about tax policy.[8]

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[7] Ford's informal conference request fell squarely within Mich Admin Code R. 205.1008(3) ("Rule 8), adopted on August 28, 1996, which permits a taxpayer to request an informal conference. Rule 8 provides as follows:

> If a taxpayer pays on the intent to assess in full before the scheduled informal conference is held in order to stop the accrual of [deficiency] interest, the taxpayer may preserve the right to dispute the assessment and raise whatever issues would have been raised had the assessment remained unpaid.

Treasury applied Ford's prepayment to the VEBA audit adjustment before the informal conference was scheduled. Treasury's reading of Rule 8 would provide a taxpayer with an informal conference to dispute a tax that the taxpayer paid but deny the taxpayer a refund, or the interest on the refund, or both, on the mistaken theory that the taxpayer did not file a refund claim. The only rational interpretation of the facts and circumstances is that a taxpayer wants a refund of the disputed tax if the taxpayer requests an informal conference to dispute the tax.

[8] The subtext of Treasury's argument is that *Sagar Trust v Department of Treasury*, 204 Mich App 128; 514 NW2d 514 (1994), be overturned. That case decided that a taxpayer was *not* required to submit to Treasury evidence of the validity of a refund claim as a condition for treating the claim as filed. The Revenue Act does not deem a refund claim denied if Treasury does not act upon the claim within a specified period of time. A taxpayer does not have access to the Court of Claims until Treasury issues a decision on the refund claim. MCL 205.22(1). If Treasury decides that a refund claim does not provide notice that the claim is "valid," Treasury can defer action indefinitely and not pay overpayment interest for the entire deferral period. The Court of Appeals rejected this tactic in *Sagar Trust*, and this Court should reject it as well.

III. FORD'S WITHDRAWAL ON AUGUST 25, 2006 OF ITS REQUEST FOR AN INFORMAL CONFERENCE WAS NOT AN ABANDONMENT OF ITS REFUND CLAIM

A. Ford expressly withdrew its request for an informal conference so that it could prosecute its refund claim in the Court of Claims

Ford withdrew its request for an informal conference because Treasury showed no inclination to schedule it. Treasury asserts that the withdrawal of the request for the informal conference was a withdrawal of its refund claim.

On August 25, 2006, Ford's representative wrote to Susan Pifer, Treasury's Director of the Tax Compliance Bureau, [App. 5-B, pp 129a-131a, Tab D] informing her of the following:

> It is our intention to withdraw our case from Informal Conference *and file an action in the Court of Claims* on the unresolved issues. [Emphasis added]

The filing of a refund claim is a matter of taxpayer intent. MCL 205.30 ("A taxpayer who ... *claims* [a tax] is not due ....") (emphasis added.) Ford's August 25, 2006 letter evidences Ford's intent to continue prosecution of its refund claim in court rather than to withdraw it. Ford bypassed Treasury's informal conference procedure to accelerate resolution of the VEBA Adjustment by going to court. Ford clearly did not intend to withdraw its refund claim.

B. Treasury failed to cite Ford's August 25, 2006 letter in arguing that Ford's withdrawal of its request for an informal conference constituted a request to withdraw its refund claim

Treasury argues that Ford abandoned its refund claim by withdrawing its request for an informal conference. Treasury cited Ford's September 19, 2006 letter to Daniel M. Greenberg, Treasury's Hearings and Disclosures Administrator [App. 27, pp 371a-374a], informing him that Ford was withdrawing its request for an informal conference. Mr. Greenberg's reply merely dismisses Ford's informal conference request. *Id.* He did not, and could not, dismiss Ford's refund claim. In fact, his reply notes that Ford paid the disputed assessment and that no balance was due. *Id.* The September 19, 2006 letter on which

Treasury relies for its abandonment argument did not contradict or otherwise change Ford's intention to prosecute its refund claim.

C. Treasury's issuance of a Final Audit Determination Letter on September 15, 2006 evidenced Treasury's understanding that Ford was not abandoning its refund claim

On September 15, 2006, Treasury issued to Ford a Final Audit Determination Letter. [App. 5-B, pp 134a-135a, Tab F] The relevant part of the letter stated:

> If this determination denies ... a refund that you claim is due you, ... this final decision of the Department may be appealed ....
> ....
> File an appeal within 90 days with the Michigan Court of Claims.

Seven years ago, when Treasury issued its final audit determination letter, Treasury understood that Ford had a refund claim pending for which Treasury had to issue a Final Audit Determination Letter. Now, Treasury changes position, asserting that it thought that Ford's withdrawal of its request for an informal conference was also a withdrawal of its refund request. Treasury's ruling on the refund claim in its Final Audit Determination Letter undermines its position that it believed that Ford abandoned its refund.

D. The Revenue Act does not treat withdrawal of a request for an informal conference as a withdrawal of its refund claim

A taxpayer is not required to request or participate in an informal conference as a condition for pursuing judicial remedies. The informal conference procedure is entirely optional with the taxpayer. MCL 205.21(2)(c); MCL 205.21(3). A taxpayer who requests an informal conference may later withdraw the request. If the taxpayer withdraws, then

> [u]pon receipt of the request for withdrawal from the informal conference process, the department shall issue a decision and order of determination and, where appropriate a final assessment, from which a taxpayer may seek an appeal as provided under section 22.[9] [MCL 205.21(2)(d)]

These procedures apply to refund claims as well. MCL 205.21(3); MCL 205.21a.

[9] An appeal as provided in section 22 includes an appeal to the Court of Claims. MCL 205.22.

If withdrawal of an informal conference request also withdrew the refund claim, then Treasury would not have been required to issue a decision and order because there would have been no refund claim to decide and no order to issue. The direction to Treasury to issue the decision and order shows that, as a matter of law, the refund claim survives withdrawal of the informal conference request.

Treasury's argument that Ford abandoned its claim is incorrect, as a evidenced by (i) Ford's clearly expressed intention to prosecute the refund claim in court following withdrawal of the informal conference request, (ii) Treasury's issuance on September 15, 2006 of a Final Audit Determination Letter, on the basis of which Ford filed suit in the Court of Claims, and (iii) the Revenue Act's clear direction to Treasury to decide a refund claim following a taxpayer's withdrawal of an informal conference request. Withdrawal of a request for an informal conference does not withdraw a refund claim.

CONCLUSION

A taxpayer is entitled to fair warning about the notice procedure that has to be followed to recover a tax illegally collected by Treasury as a result of an audit. Section 30 directs a taxpayer to "petition" Treasury or file a "claim" to recover tax. That is the extent of the direction and guidance provided in Section 30. The common understanding of these words should control their construction. Section 30 has no elaborate procedure for giving notice. A facts and circumstances rule applies to Section 30, and no reasonable person could differ in understanding from the facts and circumstances that Ford claimed a tax refund. In the Taxpayer Bill of Rights, the Legislature directed Treasury to provide guidance to taxpayers about the procedure for the filing of a refund claim. Treasury has not provided that guidance. Its absence surely cannot trump the actual words of Section 30.

A facts and circumstances test includes facts and circumstances that precede a taxpayer's disagreement with an Audit Determination. That is the federal tax rule and the notice rule in Michigan in non-tax cases. The facts and circumstances in which Ford disputed the tax on the VEBA audit adjustment

lead to only one rational conclusion: Ford claimed a refund of the tax applied to the VEBA audit adjustment.

Treasury invents a rule to define a refund claim. Treasury argues that Ford was only contesting the audit determination that it had paid and that the contest of the determination is not a refund claim. That rule is not found in Section 30 or elsewhere. It does not exist. Moreover, Treasury's rule is irrational. A taxpayer that pays a disputed audit determination wants a refund. No other outcome makes sense.

In response to Treasury's argument that it did not know why Ford disagreed with the Audit Determination, Ford pointed Treasury not only to Treasury's Audit Report of Findings but also to Ford's request for an informal conference, which expressly identified the VEBA audit adjustment as the basis of the dispute. At a minimum, Treasury was on notice of Ford's refund claim as of the filing of the conference request.

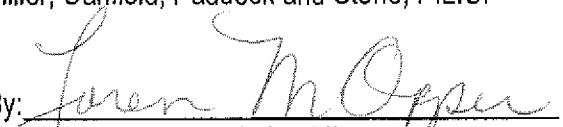
Treasury's argument that Ford withdrew its claim when it withdrew its informal conference request is contradicted by the Revenue Act, which requires Treasury to decide a refund claim if a taxpayer withdraws its conference request. Moreover, no doubt existed about Ford's intention to pursue the refund. Ford stated in a letter to Treasury that Ford was withdrawing its conference request so that it could file a refund action in the Court of Claims. Ford's intention was clear and the law is clear: A withdrawal of the informal conference request does not withdraw the underlying refund claim.

RELIEF SOUGHT

The Court should reverse the Court of Appeals' opinion, reinstate the decision of the Court of Claims and order Treasury to pay to Ford overpayment interest in the amount of $1,363,364.74, plus interest from August 16, 2013 (when Ford returned the overpayment interest to Treasury following the Court of Appeals' decision) until paid by Treasury, as provided in MCL 205.30. In the alternative, if the Court determines that Ford filed a refund claim on November 17, 2005, then Ford respectfully requests that this Court direct the Court of Claims to order Treasury to pay to Ford overpayment interest in the amount of $1,119,240.00 plus interest from August 16, 2013 until paid by Treasury. Ford also requests that it be awarded costs and attorney fees for this appeal and the appeal to the Court of Appeals in accordance with MCL 600.2591 and MCR 2.625(2).

Respectfully submitted,

Miller, Canfield, Paddock and Stone, P.L.C.

By: 

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