WAYNE STATE UNIVERSITY – 2023 SURVEY EDITION
TAXATION

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I. INTRODUCTION 515
II. SALES AND USE TAXES 516
A. TOMRA of North America, Inc. v. Department of Treasury 516
B. Brusky v Department of Treasury 517
C. TruGreen Limited Partnership v. Department of Treasury 519
D. Bed Bath & Beyond v Department of Treasury 521
E. M.L. Chartier Excavating, Inc. v. Department of Treasury 523
III. PROPERTY TAX 525
A. City of Lansing v. Angavine Holding, LLC 525
B. Oshtemo Charter Township v. Kalamazoo County & Kalamazoo County Board of Commissioners 526
C. Wal-Mart Real Estate Business Trust v. City of Bad Axe 528
IV. INCOME TAX 529
A. McLane Company Inc. v. Department of Treasury 529
V. MICHIGAN BUSINESS TAX 530
A. Zug Island Fuels Company, LLC v. Department of Treasury 530
VI. CONCLUSION 531

I. INTRODUCTION

The Michigan courts continue to address tax issues across the myriad of taxes that the state and local jurisdictions impose. Many of these cases address issues of first impression. These cases are also helpful in understanding the judiciary's current viewpoint and the enforcement of the rule of law. Unlike the pre–2014 years, pay-to-play is no longer a requirement for judicial access, and the Court of Claims is responsible for adjudicating state tax matters, except those related to ad valorem taxes and City Income taxes, which by statute, are before the Michigan Tax Tribunal.

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II. SALES AND USE TAXES

A. TOMRA of North America, Inc. v. Department of Treasury

In *TOMRA of North America, Inc. v. Department of Treasury*, the court of appeals addressed the qualification of bottle and can recycling machines for the industrial processing exemption from use tax.[1]

On appeal following a remand from the Michigan Supreme Court, which had previously affirmed a prior court of appeals decision overturning the court of claims' earlier grant of summary disposition for the Department, the court of appeals found that the machines in question did not perform any of the enumerated activities under the statute to qualify for the exemption.[2] In *TOMRA III*, the Michigan Supreme Court notably held that "the temporal limitation in subsection (7)(a) ("Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage") does not apply to the specific industrial processing activities listed in subsection (3)."[3]

TOMRA built, sold, and leased "reverse vending machines" used to return empty carbonated beverage containers, both cans and glass.[4] TOMRA filed sales and use tax refund claims based on the machines (and spare parts) qualification for the industrial processing exemption from sales and use tax.[5] The industrial processing exemption statute provides that industrial processing includes the following activities: "inspection, quality control, or testing . . . remanufacturing . . . recycling of used materials for ultimate sale at retail or reuse . . . production material handling" and "storage of in-process materials."[6]

On appeal after remand, the court of appeals held that the machines did not perform any of the listed functions contained in subsection (3), and therefore, did not qualify for the industrial processing exemption.[7]

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1. *See* TOMRA of N. Am., Inc. v. Dep't of Treasury, No. 356950, 2022 WL 2898149, (Mich. Ct. App. July 21, 2022) ("*TOMRA IV*").
2. This case began in 2014 at the Court of Claims. TOMRA of N. Am., Inc. v. Dep't of Treasury, No. 328545, 2016 WL 6825243 (Mich. Ct. App. Nov. 17, 2016) ("*TOMRA I*") and TOMRA of N. Am., Inc. v. Dep't of Treasury, 325 Mich. App. 289, 292, 926 N.W.2d 259, 261 (2018) ("*TOMRA II*").
3. MICH. COMP. LAWS ANN. § 205.54t(7)(a); TOMRA of N. Am., Inc. v. Dep't of Treasury, 505 Mich. 333, 351, 952 N.W.2d 384, 393 (2020) ("*TOMRA III*").
4. *See TOMRA II*, 325 Mich. App. at 292, 926 N.W.2d at 261.
5. *Id.* at 293, 926 N.W.2d at 261.
6. MICH. COMP. LAWS ANN. § 205.54t(3).
7. TOMRA of N. Am., Inc. v. Dep't of Treasury, No. 356950, 2022 WL 2898149, at *7 (Mich. Ct. App. July 21, 2022).

Focusing upon the statutory language which exempts activities for "inspection, quality, control, or testing," "remanufacturing," and "recycling," the court of appeals held that the machines failed to meet the statutory requirements of the listed activities and therefore, do not qualify for exemption.[8]

In addressing the testing and inspection qualification, the court of appeals found such language would only apply to goods that will be stored in finished goods inventory storage and does not extend to inspecting raw materials.[9] With respect to whether the machines perform remanufacturing, the court of appeals noted the Supreme Court's explanation that the machines "simply facilitate the collection of raw material," which does not meet the definition of "remanufacturing" contained in the statute.[10]

In regards to the recycling language, the court of appeals agreed that while the act of returning empty containers arguably constitutes "recycling" in the ordinary sense of the word, subsection (3)(i) limits exempt recycling to that which is performed upon "used materials for ultimate sale at retail or reuse."[11] This language requires the recycled materials to be sold at retail or re–used.[12] The evidence demonstrated that the returned containers are destroyed and used as raw material for different products.[13] Thus, the requirement of resale or reuse could not be met.[14]

B. Brusky v. Department of Treasury

In *Brusky v. Department of Treasury*, the court of appeals addressed the application of sales tax to delivery charges for aggregate material.[15] Pursuant to MCL 205.51(1)(d)(iv), delivery charges "incurred or to be incurred before the completion of the transfer of ownership of

8. *Id*. at *4.

9. *Id*. This is contrary to guidance issued by the Department, which advises that the inspection of raw material does qualify as an industrial processing activity. See Revenue Administrative Bulletin 2000-4, which provides guidance on the application of the industrial processing exemption. Note, RABs are merely guidance, not controlling. As a published case, this decision would override such guidance regardless. *See* In re Complaint of Rovas, 482 Mich. 90, 754 N.W.2d 259 (2008).

10. TOMRA of N. Am., Inc. v. Dep't of Treasury, No. 356950, 2022 WL 2898149 at *5 (Mich. Ct. App. July 21, 2022) (citing TOMRA of N. Am., Inc. v. Dep't of Treasury, 505 Mich. 333, 346, 952 N.W.2d 384, 391 (2020)).

11. *Id.*

12. *Id*.

13. *Id.*

14. *Id.*

15. Brusky v. Dep't of Treasury, 340 Mich. App. 42, 985 N.W.2d 237 (2022).

tangible personal property" is part of the purchase price subject to sales tax.[16]

In *Brusky*, the plaintiff was a licensed motor carrier that transported aggregate material, such as sand and gravel, in bulk quantities for customers engaged in construction projects.[17] The Plaintiff purchased aggregate for its customers and billed them for both the material costs and the delivery charges, and only charged sales tax on the material costs.[18] On audit, the Department of Treasury assessed sales tax for the failure to remit sales tax on the delivery charges.[19] The Department determined that the delivery charges were taxable as the plaintiff bore the risk of loss during delivery, ownership of the aggregate occurred after delivery, and the plaintiff's business records did not separately identify delivery income on the retail sales.[20] In its complaint filed at the court of claims, the plaintiff claimed that it was not liable for sales tax on delivery charges as it merely acted as a purchasing agent for its customers, not as a retail seller of aggregate.[21] On cross-motions for summary disposition, the court of claims found for the Department, noting that the Sales Tax Act allows for the imposition of sales tax on the entire gross proceeds of the plaintiff's business if separate books and records are not kept to show separate transactions.[22] The Court also found that the evidence supported that the delivery charges were subject to tax, as the charges were incurred prior to the completion of the sale of the aggregate material.[23]

The court of appeals affirmed, finding that the plaintiff was a seller at retail, as demonstrated by the undisputed facts.[24] The plaintiff was not merely a purchasing agent, and the Sales Tax Act does not require mutual assent to engage in sales at retail.[25]

The court of appeals also rejected the plaintiff's argument that it was primarily engaged in providing a service, not selling aggregate, and the provision of the aggregate was merely "incidental" to this service and not

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16. *Id.* at 45, 985 N.W.2d at 238.
17. *Id.*
18. *Id*. at 46, 985 N.W.2d at 238.
19. *Id*.
20. *Id.* at 46–47, 985 N.W.2d at 238–39.
21. *Id*. at 48, 985 N.W.2d at 239.
22. *Id.* at 49–50, 985 N.W.2d at 240 (citing MICH. COMP. LAWS ANN. § 205.52(3)).
23. *Id.*
24. *Id*. at 53, 985 N.W.2d at 242.
25. *Id.* at 54, 985 N.W.2d at 242. The court of appeals also noted that the plaintiff's use of resale exemption certificates to purchase the aggregate was directly in conflict with the arguments presented. *Id.*

taxable.[26] Instead, the court held that the "incidental to services" test of *Catalina Marketing* is irrelevant to the analysis.[27] Pursuant to the statute, the sales price includes "[d]elivery charges incurred or to be incurred before the completion of the transfer of ownership of tangible personal property . . . from the seller to the purchaser."[28] The court reasoned that this language clearly indicated that the legislature's intent that delivery charges be subject to sales tax.[29]

C. TruGreen Limited Partnership v. Department of Treasury

In *TruGreen Limited Partnership v. Department of Treasury,* the court of appeals addressed the use tax exemption for property consumed in certain agricultural activities under Section 205.94 of the Use Tax Act.[30]

The plaintiff, TruGreen Limited Partnership, provides lawn and ornamental plant care services to residential and commercial properties.[31] TruGreen sought a refund of use tax paid on the chemicals and products used to provide its services under the designated "agricultural production" exemption.[32] The Department of Treasury denied the refund, relying upon a stale administrative rule that the exemption is only applicable to agricultural production.[33] In 2004, however, revisions to the statutory language removed all references to "production" and adopted the "things of the soil" language.[34] Notwithstanding the statutory amendment that superseded the rule, the court of claims held for the Department, relying on case law issued prior to the amendment.[35] TruGreen appealed and the

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26. *Id.* at 58–59, 985 N.W.2d at 244–45. The plaintiff's argument rested on the "incidental to services" test articulated by the Michigan Supreme Court in *Catalina Marketing v Department of Treasury*, 470 Mich. 13, 19, 678 N.W.2d 619, 623 (2004).

27. *Id*. at 58, 985 N.W.2d at 244.

28. *Id*. at 52, 985 N.W.2d at 241.

29. *Id*. at 52, 59, 985 N.W.2d at 241, 245 (citing MCL 205.51(1)(d)(iv)).

30. MICH COMP. LAWS § 205.94; TruGreen Ltd. P'ship v. Dep't of Treasury, 332 Mich. App. 73, 955 N.W.2d 529 (2020), *vacated*, 507 Mich. 950, 959 N.W.2d 177 (2021).

31. *TruGreen Ltd. P'ship*, 332 Mich. App. at 78, 955 N.W.2d at 531.

32. *Id*. at 79, 955 N.W.2d at 532.

33. *Id.* MICH. COMP. LAWS § 205.94(1)(f) provides an exemption for property "sold to a person engaged in a business enterprise and using and consuming the property in the tilling, caring for, or harvesting of the things of the soil."

34. *Id*. at 79, 955 N.W.2d at 532. Further revisions to the statute in 2008 and 2012 were minor and did not reintroduce a "production" requirement. *Id.* at 104, 955 N.W.2d at 545 (Swartzle, J., dissenting). In 2017, proposed legislation would have qualified "things of the soil" expressly to agricultural purposes by changing the language to "things of the soil *for agricultural purposes*," but such language was stripped from the bills in the Senate and not reinstated into the version enacted into law. *Id.* at 105, 955 N.W.2d at 546 (Swartzle, J., dissenting) (emphasis added).

35. *Id*. at 80, 955 N.W.2d at 533; *see also* 2012 Mich. Pub. Acts 474, Sec. 4(1)(f).

court of appeals upheld the decision of the court of claims 2-1.[36] The court began its analysis by first finding that tax exemptions must be "strictly construed" against taxpayers and that TruGreen "bears a heavy burden" and "must demonstrate that the Legislature had the economic interests of lawn care companies in mind when it enacted the exemption."[37] The majority rejected TruGreen's claim that it was engaged in a business enterprise caring for things of the soil and determined that TruGreen's "selectively *harvested* words" did not properly interpret the statute.[38] Rather, the majority "focused on the whole textual *landscape*" and found that "considered within its contextual milieu, the term 'things of the soil' pertains to products of farms and horticultural businesses, not blades of well-tended grass."[39] Therefore, the exemption was not applicable to the activities performed by TruGreen.[40]

Judge Swartzle, in a highly detailed thirteen-page dissent, found eight errors in the majority's statutory construction and opined that TruGreen had met the language of the statute in effect and statutory construction was not necessary.[41] Starting with the initial statutory exemption enacted in 1937, Judge Swartzle traced the versions of the exemption and the words used to determine the meaning of the phrase "things of the soil."[42] Initially, the exemption was for property used in "agricultural production."[43] Subsequently, all references to "production" were eliminated, and the phrase "things of the soil" adopted.[44] Noting that "things of the soil" plainly includes agricultural items not necessarily "produced" for sale, such as lawn care, reading a production requirement into the statute was beyond the plain language of the statute and inappropriate under the canons of statutory interpretation.[45] Lastly, Judge Swartzle noted that requiring taxpayers to prove "what was in the minds of the Legislature" at the time of the statutory revision was not proper. As noted by Judge

36. *TruGreen Ltd. P'ship*, 332 Mich. App. 73, 955 N.W.2d 529.
37. *Id.* at 81, 955 N.W.2d at 533.
38. *Id*. at 82–83, 955 N.W.2d at 534.
39. *Id*. at 85, 955 N.W.2d at 535.
40. *Id*. at 89, 955 N.W.2d at 537; *see also id*. at 84 n.4, 955 N.W.2d at 535 (quoting a Bible verse from the Book of Genesis as support to disregard a textual approach by noting that "[s]ometimes things of the soil do not grow from the soil at all. . . God made the wildlife of the earth after their kind, and the herd-animals after their kind, and all crawling things of the soil after their kind.") (internal citations and quotation marks omitted).
41. *See id.* at 97, 955 N.W.2d at 542 (Swartzle, J., dissenting).
42. *Id*. at 104–09, 955 N.W.2d at 545–48.
43. *Id.*
44. *Id*.
45. *Id.* at 109, 955 N.W.2d at 547–48.

Swartzle, it is the court's job to apply the statute as written and not as "conjured in the minds of the Legislature."[46]

On TruGreen's application for leave, the Michigan Supreme Court vacated the court of appeals decision and remanded the case back to the court of appeals for reconsideration in light of *TOMRA of North America Inc. v Department of Treasury*.[47] In *TOMRA*, the Supreme Court held that the statutory doctrine of strict construction of tax exemptions is a doctrine of last resort that is only to be used if the statutory language required interpretation.[48] Absent an ambiguity, tax exemptions should not be strictly construed against the taxpayer.[49]

On July 29, 2021, the court of appeals issued a revised 2-1 decision which was nearly identical to its prior decision but for the removal of the "strict construction" language.[50] Judge Swartzle again dissented and noted that the majority's revised opinion now only violated seven statutory construction principles, rather than eight.[51] TruGreen again submitted an Application for Leave, and the Michigan Supreme Court ordered oral argument on the application, scheduled for January of 2023.[52]

D. Bed Bath & Beyond v. Department of Treasury

In *Bed Bath & Beyond, Inc. v. Department of Treasury*, the Michigan Supreme Court addressed the application and construction of the Use Tax Act[53] to advertisements and coupons mailed to Michigan addresses.[54] The court of appeals affirmed the court of claims

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46. *Id*. at 116, 955 N.W.2d at 551.

47. TruGreen Ltd. P'ship v. Dep't of Treasury, 507 Mich. 950, 959 N.W.2d 177 (2021) (citing TOMRA of N. Am., Inc. v. Dep't of Treasury, 505 Mich. 333, 952 N.W.2d 384 (2020)).

48. *TOMRA III*, 505 Mich. at 343, 952 N.W.2d at 389.

49. *See id.*

50. *Compare* TruGreen Ltd. P'ship v. Dep't of Treasury, 338 Mich. App. 248, 979 N.W.2d 739 (2021) (the court of appeals opinion on remand), *cert. granted*, 509 Mich. 920, 971 N.W.2d 224 (2022), *with TruGreen*, 332 Mich. App. 73, 955 N.W.2d 529 (the original court of appeals opinion).

51. *TruGreen*, 338 Mich. App. at 263–64, 979 N.W.2d at 747 (Swartzle, J., dissenting).

52. TruGreen Ltd. P'ship v. Dep't of Treasury, 509 Mich. 920, 971 N.W.2d 224 (2022) (order for oral argument); *2023 January Case Information*, MICH. CTS. https://www.courts.michigan.gov/courts/supreme-court/case-information-2022-2023-term/2023-january-case-information/ [https://perma.cc/Q3UC-BA83] (last visited Feb. 1, 2023) (showing oral argument occurred in January).

53. MICH. COMP. LAWS ANN. § 205.91.

54. Bed Bath & Beyond, Inc. v. Dep't of Treasury, No. 352088, 352667, 2021 WL 2877587, at *1 (Mich. Ct. App. Jul. 8, 2021), *cert. denied*, 509 Mich. 883, 970 N.W.2d 887 (2022).

determination that the taxpayer did not retain sufficient control to constitute a tax "use" within the state.[55]

The plaintiff had advertising mailings sent to addresses within the state.[56] The Department of Treasury assessed use tax on the cost of those mailings, claiming the plaintiff "used" the mailings in the state.[57] The plaintiff protested the assessment, as pursuant to the court of appeals' holding in *Sharper Image Corp. v. Department of Treasury,*[58] use tax was inapplicable when a taxpayer cedes control of the property (in that case mailed catalogs) outside of Michigan and does not exercise control or other indicia of ownership over the property while it is in the state.[59] The plaintiff had designed the advertising materials in-house, at their New Jersey headquarters.[60] A printing company printed the advertisements and sent the advertisements to a direct mail vendor to provide mail services.[61] None of these activities occurred in Michigan.[62]

In assessing tax, the Department had relied upon *Ameritech Publishing, Inc. v. Department of Treasury,*[63] which found use tax was owed on telephone directories printed outside of Michigan and then delivered within the state, as the taxpayer had retained some control over the directories' distribution after they were delivered to the Michigan distributor.[64] The plaintiff protested the assessment, and the hearing referee upheld the assessment finding that plaintiff exercised control when it directed who should receive the advertisements and that distribution by mail demonstrated the exercise of that control.[65]

Thereafter, the plaintiff filed a complaint at the court of claims.[66] The Department moved for summary disposition, but the court of claims held in favor of Bed Bath and Beyond.[67] On appeal, the Department contended

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55. *Id.* at 8–9.

56. *Id.* at 1.

57. *Id.* at 2.

58. Sharper Image Corp. v. Dep't of Treasury, 216 Mich. App. 698, 702–04, 550 N.W.2d 596, 598 (1996).

59. *Bed Bath & Beyond*, 2021 WL 25877587 at *2. The Use Tax Act defines "use" as "the exercise of a right or power over tangible personal property incident to the ownership of that property including transfer of the property in a transaction where possession is given." MICH. COMP. LAWS ANN. § 205.92(b).

60. *Bed Bath & Beyond*, 2021 WL 25877587 at *1.

61. *Id.*

62. *Id*.

63. Ameritech Publishing, Inc. v. Dep't of Treasury, 281 Mich. App. 132, 761 N.W.2d 470 (2008).

64. *Id.* at 139, 761 N.W.2d at 475.

65. *Bed Bath & Beyond*, 2021 WL 25877587 at *2.

66. *Id.* at *3.

67. *Id*. The court of claims found for the Plaintiff under Mich. Ct. Rules 2.116(I)(2), which provides: "[i]f it appears to the court that the opposing party, rather than the moving

that the plaintiff's requirements as to how and when the advertising coupons could be redeemed in Michigan demonstrated "control" over the advertisements in the state.[68] The court of appeals affirmed, finding that the out-of-state direct-mail vendor was solely responsible for mailing the flyers, that the taxpayer had ceded all control over the advertising materials prior to their delivery to the United States Postal Service and did not thereafter exercised any control over the flyers once they were in Michigan.[69] The court further noted that the necessary "power" or "control" was not exercised by Bed Bath and Beyond merely by providing a mailing list and directing when the advertisements were to be delivered.[70] Such actions did not make the distribution taxable.[71]

Judge Markey dissented in part, finding that advertising materials 1) were "used" as a means to convince a customer to purchase a product or service and 2) were also "used" by a consumer to make a discretionary purchase.[72] Her dissent relied upon the fact that as some of the flyers were delivered to USPS facilities in Michigan; at least that portion of the advertisement should be subject to use tax.[73] The basis for her dissent was that if the taxpayer had delivered the mailings itself, they would have been taxable, and a party should not be able to escape taxation merely by contracting delivery to the printer.[74] The majority, however, noted that the third-party printer was solely responsible for determining how to distribute the flyers.[75]

E. M.L. Chartier Excavating, Inc. v. Department of Treasury

In *M.L. Chartier Excavating, Inc. v. Department of Treasury*, the Michigan Supreme Court addressed the applicability of the rolling stock exemption from use tax contained in MCL 205.94k.[76]

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party, is entitled to judgement, the court may render judgement in favor of the opposing party."

68. *Bed Bath & Beyond*, 2021 WL 25877587 at *4.

69. *Id.* at *8.

70. *Id.* at *7.

71. *Id.* at *9.

72. *Id.* Judge Markey noted that such "use" was not within the statutory definition, to which her personal observations "must give way." *Id*. at *10 (Markey, J., dissenting in part, concurring in part).

73. *Id.* Approximately 4.1 percent of the total mailings had been delivered to USPS facilities in Michigan during the years in issue. *Id.* at *2.

74. *See id.* at *10–13.

75. *Id.* at *9.

76. M.L. Chartier Excavating, Inc. v. Dep't of Treasury, No. 353163, 2021 WL 2599601, at *1 (Mich. Ct. App. June 24, 2021), *cert. denied*, 509 Mich. 961, 972 N.W.2d 839 (2022).

The plaintiff, M.L. Chartier Excavating, was engaged in several activities for its utility customers, such as well pad construction, servicing oil rigs, digging and cleaning rig pits, environmental remediation, and other excavating, trucking, and transportation services.[77] The plaintiff had claimed a "rolling stock" exemption from use tax for certain "trucks and trucking equipment that regularly crossed state lines."[78] The Department performed an audit and determined the exemption did not apply as the plaintiff did not qualify as an "interstate fleet motor carrier" and subsequently, issued an assessment.[79] The plaintiff argued that it was engaged in transporting the property of others and therefore met the statutory definition of "interstate motor carrier."[80] After a three-day bench trial, the court of claims found for the Department, holding that the plaintiff was not "primarily" engaged in transportation for hire and had not shown that the property it transported across state lines belonged to others.[81]

The court of appeals affirmed on different grounds.[82] Pursuant to MCL 205.94k(4), the rolling stock exemption is only available to an "interstate fleet motor carrier."[83] That term, as defined, requires a person engaged in the business to have a fleet, "*whose fleet mileage was driven at least 10% outside of this state in the immediately preceding tax year*."[84] The court of appeals, reading the Use Tax Act and the exemption as a whole, determined that the ten percent out-of-state mileage figure may only be satisfied by the activity of that portion of the fleet used for interstate transportation-for-hire.[85] While the parties had stipulated that the taxpayer's entire fleet of trucks and trailers satisfied the ten percent requirement, plaintiff failed to establish that the portion fleet used for

77. *Id.* at *1.
78. *Id.*
79. *Id.* MCL 205.94k(6)(d) defines an "interstate fleet motor carrier" to mean "a person engaged in the business of carrying persons or property, other than themselves, their employees, or their own property, for hire across state lines, whose fleet mileage was driven at least 10% outside of this state in the immediately preceding tax year." MICH. COMP. LAWS ANN. § 205.94(6)(d) (West 2022). The parties had stipulated that Plaintiff's trucks and trailers met the ten percent out-of-state mileage requirement contained in MCL 205.94k(6)(d). *Id.* at *2.
80. *Id.*
81. *Id.*
82. *See id.*
83. MICH. COMP. LAWS ANN. § 205.94k(4) (2012).
84. MICH. COMP. LAWS ANN. § 205.94k(4) (2012) (emphasis added).
85. *M.L. Chartier Excavating, Inc.*, 2021 WL 2599601 at *5.

interstate transportation-for-hire met the ten percent test.[86] Thus, Plaintiff had failed to meet its burden of proof of entitlement to the exemption.[87]

III. PROPERTY TAX

A. City of Lansing v. Angavine Holding, LLC

In *City of Lansing v. Angavine Holding, LLC*, the Michigan Court of Appeals determined the jurisdiction of the State Tax Commission and addressed the qualification of omitted real property and opportunity for collection of back taxes pursuant to MCL 211.154.[88]

The City had appealed the State Tax Commission's decision that remodeled apartments in commercial property did not qualify as omitted property.[89] Angavine Holding, the property owner, had partially renovated a commercial building and converted first floor office space into apartments.[90] The City failed to update its assessment records until six years later.[91] The City filed a Section 154 Petition with the State Tax Commission to add the value of apartments to the assessment rolls for the current and past two tax years as permitted under the statute.[92] The Commission determined that the property constituted "omitted property" for 2016 yet dismissed the claim for lack of jurisdiction.[93] For 2017 and 2018, the State Tax Commission determined that the remodeled property did not constitute "omitted property" and the City was not entitled to collect back taxes on the property.[94]

On appeal, the Circuit Court of Ingham County reversed the Commission's jurisdiction decision for 2016, as well as the determination that the property constituted "omitted property" for the latter years.[95] The circuit court determined that 1) it had jurisdiction over the matter (despite a statutory clause that suggests that only the property owner may appeal an STC determination) and 2) the renovation of the property caused the property to meet the definition of omitted property, which would allow the City to collect back taxes.[96]

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86. *Id*. at *6.
87. *Id.*
88. City of Lansing v. Angavine Holding, LLC, 339 Mich. App. 210, 981 N.W.2d 372 (2021).
89. *Id.* at 216–17, 981 N.W.2d at 376–77.
90. *Id.*
91. *Id.*
92. *Id.* at 215, 981 N.W.2d at 376.
93. *Id.*
94. *Id*. at 215–16, 981 N.W.2d at 376.
95. *Id*. at 216–17, 981 N.W.2d at 377.
96. *Id.*

Angavine Holding, LLC appealed to the court of appeals, which affirmed.[97] The court of appeals found the City was entitled to judicial review of the State Tax Commission determination.[98] Pursuant to Article 6, Section 28 of the Michigan Constitution, 1) the State Tax Commission decision was a "final decision of an administrative agency," 2) the agency acted in a judicial or quasi-judicial capacity, and 3) "the decision must affect private rights or licenses."[99] The court of appeals stated that the Revised Judicature Act "plainly expressed intent to resolve any statutory ambiguity or inconsistency in favor of judicial review."[100]

Having found judicial review was proper, the court of appeals then addressed whether the first-floor apartments qualified as omitted property under the statutory definition.[101] The court of appeals found the definition under the General Property Tax Act to be clear and unambiguous.[102] As the City had been aware of the new construction but failed to include that property when assessing the property's taxable value, the property met the definition of omitted property, and the City could collect back taxes for the prior two years.[103]

B. Oshtemo Charter Township v. Kalamazoo County & Kalamazoo County Board of Commissioners

In *Oshtemo*, the Michigan Court of Appeals addressed the ability of a charter township to impose a higher millage pursuant to Article 9, Section 31 of the Michigan Constitution (a provision of the Headlee Amendment).[104] Pursuant to Headlee, charter townships may levy a higher millage than general-law townships.[105] Headlee also provided that a local

97. *Id.*

98. *Id.* at 225, 981 N.W.2d at 381.

99. *Id*. at 220 (citing Midland Cogeneration Venture Ltd. P'ship v Naftaly, 489 Mich. 83, 91, 803 N.W.2d 7674 (2011)).

100. *Id.* at 229, 981 N.W.2d at 381.

101. *Id.* As defined in MCL 211.154(t), "omitted real property" is "previously existing tangible real property not included in the assessment" with the burden of proof on the assessing jurisdiction.

102. *Id.* at 230, 981 N.W.2d at 384.

103. *Id.* at 232, 981 N.W.2d at 385.

104. Oshtemo Charter Twp. v. Kalamazoo Cty, 339 Mich. App. 87, 91, 981 N.W.2d 176, 178 (2021). The Headlee Amendment added sections 25 through 34 to Article 9 of the Michigan Constitution. Section 31 provides "Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon." MICH. CONST. art. IX § 31.

105. *Oshtemo,* 339 Mich. App. at 93, 981 N.W.2d at 179.

unit of government may not levy a tax without voter approval unless that tax was authorized at the time of the Amendment's ratification.[106]

At the time of Headlee's enactment, Oshtemo Charter Township was a general-law township.[107] In 1979, however, Oshtemo became a charter township.[108] When the township sought to levy an additional 0.5 mills for general tax purposes, the Kalamazoo County Board of Commissioners rejected its proposal, determining that it had failed to obtain voter approval for the additional millage rate.[109]

The township appealed the county's determination to the Michigan Tax Tribunal.[110] The issue was whether the township remained limited to the tax rate for general-law township or whether the limit for charter townships applied once it became a charter township.[111] Relying in part on an Attorney General opinion,[112] the tribunal found that as Oshtemo was a general law township at the time of the amendment ratification, it remained limited to the general-law township rate and could not levy a greater rate absent voter approval.[113]

On subsequent appeal, the Michigan Court of Appeals held that Oshtemo became eligible to tax according to the applicable preexisting tax structure in effect as to charter township rates, after their post–Headlee change in circumstances.[114] Finding the Attorney General opinion to be inconsistent with later decided case law[115] and the statutory acts governing township taxing authority, the court of appeals reversed and remanded the case back to the tribunal for further proceedings consistent with its opinion.[116]

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106. *Id.*
107. *Id.* at 90, 981 N.W.2d at 177.
108. *Id.*
109. *Id.*
110. *Id.* at 90, 981 N.W.2d at 178.
111. *Id.* at 91, 981 N.W.2d at 178.
112. *Id.* at 91, 981 N.W.2d at 178; OAG, 1985-1986, No. 6285, p. 46 (Apr. 17, 1985).
113. *Oshtemo,* 339 Mich. App. at 91, 981 N.W.2d at 178.
114. *Id.* at 96, 981 N.W.2d at 180.
115. *Id.* at 91, 981 N.W.2d at 178. The court found the attorney general opinion particularly inconsistent with *Saginaw Co. v. Buena Vista Sch. Dist*., 196 Mich. App. 363, 493 N.W.2d 437 (1993), where the defendant school district redrew its border to be located entirely within a charter township, which the Court held permitted the school district to levy an additional mill.
116. *Oshtemo*, 339 Mich. App. at 96–97, 981 N.W.2d at 181 (citing to township authority under The Charter Township Act, MCL 42.27(2) and the Property Tax Limitation Act, MCL 211.211(4)).

C. Wal-Mart Real Estate Business Trust v. City of Bad Axe

In *Wal-Mart*, the Michigan Court of Appeals addressed the valuation of a big box retail store under the General Property Tax Act.[117]

The subject property was a parcel of land improved with a 184,000 square foot retail store built in 2003.[118] Petitioner, who owned the land and improvements and was the owner-occupier, challenged the city's taxable valuation of the property at the Michigan Tax Tribunal.[119] The Tribunal concluded that the true cash value of the owner-occupied store to be $23.15/SF (as evidenced by the market analysis and methodology of petitioner's expert) and rejected the petitioner's method of valuation which was based upon assuming a hypothetical lease for the subject property.[120]

On appeal, the court of appeals affirmed the Tribunal's decision and reiterated that fee simple interest is "absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat."[121] The court stated that the city's appraiser erroneously assumed an inherent feature of the property is the existence of a successful business tenant that will transfer with the sale.[122] This was incorrect as the issue is the valuation of the real property, not petitioner's business.[123] Valuation must be what would actually be sold, not what could be sold.[124] Here, the property must be valued as "vacant and available" as there was no existing lease in place.[125] Having failed to demonstrate that the tribunal committed an error of law or adopted a wrong legal principle, the court of appeals affirmed.[126]

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117. Walmart Real Est. Bus. Tr. v. City of Bad Axe, No. 358930, 2022 WL 12071984 (Mich. Ct. App. Oct. 20, 2022) (per curiam); MICH. COMP. LAWS ANN. § 211.1 (2023).
118. *Walmart*, 2022 WL 12071984, at *1.
119. *Id.*
120. *Id.*
121. *Id.* at *2, (citing Autozone Stores Inc./Auto Zone, No. 2137 v. City of Warren, No. 320213, 2015 WL 3874642 (Mich. Ct. App. June 23, 2015)).
122. *Id.* at *3.
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* at *4–5.

IV. INCOME TAX

A. McLane Company Inc. v. Department of Treasury

In *McLane*, the Michigan Court of Appeals addressed whether a reduction in an overpayment carried forward constituted a "deficiency" under the statute of limitations contained in the Revenue Act.[127]

The Department of Treasury audited the taxpayer for years 2008 through 2010.[128] The Department recognized an overpayment that was paid in 2017.[129] On its 2011 return, the taxpayer had a significant overpayment, which it carried forward to the subsequent eight years.[130] The Department claimed the refund had included the prior-year overpayment.[131] The Department also acknowledged that it had never notified the taxpayer of the carryforward adjustment until February 2018, when upon a request by the taxpayer for information, it sent a notice, dated February 2017, eliminating the carryforward of the prior-year overpayment.[132] The taxpayer argued that the adjustment of the 2011 return was unlawful as the four-year statute of limitations in MCL 205.27a(2) had expired, and it had never been notified of the reduction of the prior-year overpayment.[133]

The court of claims rejected the taxpayer's argument, finding that the reduction of a credit that does not result in a tax deficit cannot be a "deficiency."[134] The court found that the department had not issued an "assessment" as there was no deficiency to be paid by the taxpayer.[135]

On appeal, the court of appeals affirmed, finding that absent a deficiency, the Revenue Act's statute of limitations did not apply.[136] The court of appeals determined that the disallowance of a credit did not result in additional tax being owed, and therefore, it would be incorrect to characterize the notice as an assessment:

> [The taxpayer] did not have to cut a check to pay a tax deficit. It is, therefore, inaccurate to characterize this as an assessment of a

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127. *See* McLane Co. Inc. v. Dep't of Treasury, No. 354973, 2021 WL 4808351 (Mich. Ct. App. Oct. 14, 2021), *cert. denied*, 509 Mich. 1045, 974 N.W.2d 825 (2022).
128. *Id.* at *1.
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id*.
133. *Id.*
134. *Id.* (noting that the term "deficiency" is not defined in tax laws or regulations, an oversight that the Department should consider correcting).
135. *Id.* at *2.
136. *Id*.

> "deficiency," because whether or not there is a tax deficit to pay is merely a potential secondary effect of the disallowance of a credit.[137]

The court of appeals acknowledged the validity of the taxpayer's frustration with how the department handled the matter, particularly highlighting the department's failure to explain that the audit refund included the overpayment credit from the 2011 tax return.[138]

V. MICHIGAN BUSINESS TAX

Effective in 2012, the Corporate Income Tax did not replace the Michigan Business Tax.[139] Rather, taxpayers had the opportunity to elect to remain on the Michigan Business Tax if they desired to utilize certificated credits issued under the Michigan Business Tax.[140] Thus, coverage of the Michigan Business Tax continues.[141]

A. Zug Island Fuels Company, LLC v. Department of Treasury

In *Zug Island,* the Michigan Court of Appeals addressed whether the inventory deduction from the Modified Gross Receipts Tax base for "purchases from other firms" includes delivery charges.[142]

Zug Island filed Michigan Business Tax returns including the delivery charges associated with its coal purchases within its inventory deduction.[143] The statute provides that the inventory deduction applies to "[i]nventory acquired during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price for that inventory."[144] The Department disallowed the deduction, finding that the delivery charges had not been included in the original contract price for the coal.[145] While the coal and its delivery were contracted for simultaneously, the court found that the delivery charges were incurred under separate contracts with various transportation companies and therefore could not be deducted.[146]

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137. *Id*.
138. *Id*.
139. *See* MICH. COMP. LAWS §§ 208.1500, 206.680.
140. *Id*.
141. *Id*.
142. Zug Island Fuels Co., LLC v. Dep't of Treasury, No. 356419, 2022 WL 1122637 (Mich. Ct. App. Apr. 14, 2022), *cert. denied*, 978 N.W.2d 836 (Mich. 2022).
143. *Id.* at *1.
144. MICH. COMP. LAWS ANN. § 208.1113(6)(a) (2013).
145. *Zug Island*, 2022 WL 1122637 at *2.
146. *Id.*

Zug Island filed a complaint at the court of claims.[147] The court of claims denied Zug Island's motion for summary disposition, holding that the deduction of delivery charges is limited.[148] Specifically, the court of claims found that the charges must have: (1) been included in the contract for the acquisition of the inventory and (2) the contract price included both the cost of the inventory as well as the cost of delivery.[149]

On appeal, the court of appeals found that the contracts to purchase the coal inventory did not include specific pricing that covered the cost of the coal itself and the cost of having it delivered to the Taxpayer.[150] The court of appeals held that these contracts did not fit within the required framework for the charges to be included in the deduction.[151] Having found that the court of claims correctly ruled "[a]s a matter of law that [the taxpayer's] delivery costs were not included in the original contract prices for the coal and that, therefore, the delivery charges could not be claimed under the MBTA's inventory deduction," the court of appeals affirmed.[152]

VI. CONCLUSION

The tax docket continues to progress in Michigan. With an appeal as of right to the Michigan Court of Appeals, practitioners can expect further refinement of cases. And the Michigan Supreme Court usually will hear a few applications on tax matters each year. Thus, the drum beats steady on clarifying Michigan's statutory tax regimes to real life issues that arise, both to corporate and individual taxpayers. As Judge Learned Hand stated, "[N]obody owns any public duty to pay more than the law demands."[153]

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147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at *4.
151. *Id.*
152. *Id.* at *4–5.
153. Gregory v. Helvering, 293 U.S. 465 (1935).