TAXATION

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I. SINGLE BUSINESS TAX

A. One's Travel Ltd. v. Michigan Department of Treasury

In the case of *One's Travel Ltd. v. Michigan Department of Treasury*,[1] under consideration was whether or not One's Travel Ltd. qualified for the small business tax credit under the Single Business Tax Act ("SBTA").[2] One's Travel Ltd. was a for-profit Michigan corporation, and a subsidiary of Credit Union ONE.[3] The small business tax credit works to offset single business tax ("SBT") liability for businesses that have limited gross receipts,[4] pay a limited amount as

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1. 288 Mich. App. 48 (2010).

2. The Single Business Tax Act, MCL sections 208.1-145 (West 1975) (repealed 2007) was repealed for tax periods after December 31, 2007, but open years continue to be audited.

3. *One's Travel Ltd.*, 288 Mich. App. at 51.

4. The small business tax credit is available under MCL section 208.36(2) (West 1975) (repealed 2007), which provides: "If the tax credit allowed under this section exceeds the tax liability of the taxpayer for the tax year, that portion that exceeds the tax liability shall be refundable."

compensation and director's fees to shareholders or officers.[5] To determine One's Travel Ltd.'s qualification for the credit, the court needed to determine whether, for purposes of qualifying for the credit, One's Travel Ltd. had to consolidate its business activities with the gross receipts of the other members in its affiliated group.[6]

Both One's Travel Ltd. and Data Tech had filed returns on a separate basis, believing that consolidation of business activity with its affiliates was not required, as their controlling company, Credit Union ONE, was exempt from taxation under the SBTA.[7] The court of claims had previously found that One's Travel Ltd. and Data Tech Services, Inc. did not qualify for the small business credit, because after combining their gross receipts with the credit union's business activity, they exceeded the limits of the small business tax credit.[8]

It was undisputed that Credit Union ONE was an exempt entity. What was disputed, however, was whether such exemption prevented its subsidiaries, One's Travel Ltd., and Data Tech, from consolidating their gross receipts with Credit Union ONE's receipts.[9] The requirement of combining gross receipts of affiliated members for purposes of the small business tax credit is governed by MCL 208.36(7).[10] The statute indicates that for affiliated groups, for a controlled group of corporations, or for an entity under common control, the small business tax credit shall not be permitted unless the business activities of the entities are consolidated, and if the taxpayers' consolidated gross receipts do not

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5. On its own, One's Travel Ltd. fulfilled all the requirements of MICH. COMP. LAWS ANN. § 208.36 (West 1975) (repealed 2007).

6. *One's Travel Ltd.*, 288 Mich. App. at 57. This issue also applied to Data Tech Services, Inc., another member of One's Travel Ltd.'s affiliated group. Because the same issue was involved in both cases, the parties stipulated that the matters would be consolidated and the issue decided on motions for summary disposition before the court of claims. *Id.*

7. Credit Union ONE is a state-charted credit union created pursuant to Michigan's Credit Union Act, MICH. COMP. LAWS ANN. §§ 490.101-601 (West 2004), and is exempt from taxation under the SBTA.

8. MICH. COMP. LAWS ANN. § 208.36; *One's Travel Ltd.*, 288 Mich. App. at 61 (citing Horner, *Michigan Single Business Tax, Small Business Credit*, 47 MICH. B. J. 734, 736 (1978)).

9. *One's Travel Ltd.*, 288 Mich. App. at 57-58.

10. MCL section 208.36(7) provides:

> An affiliated group as defined in the Act, a controlled group of corporations as defined in section 1563 of the Internal Revenue code and further described in 26 C.F.R. 1.414(b)-1 and 1.414(c)-1 to 1.414(c)-5, or an entity under common control as defined by the Internal Revenue Code shall not take the credit allowed by this section unless the business activities of the entities are consolidated.

MICH. COMP. LAWS ANN. 208.36(7) (West 1975) (repealed 2007).

exceed the limitations of the Act.[11] Only then can the individual members of the group qualify for the credit.[12]

The Plaintiffs claimed that they did not form an affiliated group,[13] nor do they meet the definition of a controlled group of corporations, because Credit Union ONE was not a "corporation" within the meaning of the statute.[14] The court looked to the definition of "corporation" as defined by the Internal Revenue Code,[15] to determine whether an "affiliated group" existed. The court found that as the meaning of "United States corporation" under the SBTA adopts the same definition, there was no disharmony that Credit Union ONE is a "United States corporation" within the meaning of Section 3(1).[16] The court noted that while Credit Union One was not a corporation under the Michigan Business Corporation Act,[17] and although it was not registered with the Corporations Division of the Michigan Department of Labor and Economic Growth, it was an "association" as chartered under Michigan's Credit Union Act,[18] and regulated by the Office of Financial and Insurance Regulation.[19] The court also noted that Credit Union ONE owned or controlled 80% more of the capital stock with voting rights of both Data Tech and One's Travel Ltd., which would, by itself, meet the definition of an "affiliated group."[20] Therefore, the court found that the Plaintiffs were required to consolidate their gross receipts with the business activity of their parent, Credit Union ONE, in determining whether or not they qualified for the SBT small business tax credit.[21]

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11. *Id.*

12. *One's Travel Ltd.*, 288 Mich. App. at 57.

13. The term "affiliated group" is defined in the SBTA. MCL section 208.3(1) defines an "affiliated group" as: "2 or more United States Corporations, 1 of which owns or controls, directly or indirectly, 80% or more of the capital stock with voting rights of the other United States corporation or United States corporations. As used in this subsection, 'United States corporation' means a domestic corporation as those terms are defined in section 7701(a)(3) and (4) of the Internal Revenue Code."

14. *One's Travel Ltd.*, 288 Mich. App. at 58.

15. "The term 'corporation' includes associations, joint-stock companies, and insurance companies." I.R.C. § 7701(a)(3), incorporated by MICH. COMP. LAWS ANN. § 208.3(1); *One's Travel Ltd.*, 288 Mich. App. at 48.

16. *One's Travel Ltd.*, 288 Mich. App. at 59.

17. Michigan Bus. Corp. Act, MICH. COMP. LAWS ANN. §§ 450.1101-2099 (West 1973).

18. MICH. COMP. LAWS ANN. §§ 490.101-604 (West 2004).

19. The Office of Financial and Insurance Regulation is contained within the Michigan Department of Licensing and Regulatory Affairs ("LARA"), previously known as the Department of Labor and Economic Growth.

20. *One's Travel Ltd.*, 288 Mich. App. at 60.

21. *Id.* at 61.

The Plaintiffs' alleged that even if Credit Union ONE could be considered part of an affiliated group, their gross receipts could not be consolidated with the business activity of Credit Union ONE, as Credit Union ONE did not have "gross receipts" or "business activity."[22] Plaintiffs' argument was based on the presumption that as a tax exempt entity, Credit Union ONE was not a "taxpayer" under the SBTA.[23] However, the court reviewed the definition of business activity as contained within the SBTA,[24] and found that under the plain language of the statute there is no mandate that requires an entity to be a "taxpayer" in order to have business activity.[25] The court found that Credit Union ONE's activities provided benefit to "others" and under the plain ordinary meaning of the statute, Credit Union ONE had business activity, even though exempt from tax.[26]

The court noted that it would be illogical to find that the definition of "business activity" contained within the SBTA could not be applied to Credit Union ONE, even though Credit Union ONE was exempt from taxation under the Act.[27] The court distinguished the situation from a previous decision of the court, where a parent corporation did not have SBT liability and its subsidiaries qualified for the small business tax credit on a standalone basis.[28] In *Alameda Gage Corp.*, the court had held that the subsidiary of the parent corporation qualified for the small business tax credit without consolidation, because the parent corporation had no business activity.[29] This was because the parent corporation had no in-state activities whatsoever. "By definition, 'business activity' includes only those activities that occurred in the State."[30] The only

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22. *Id.* at 62.

23. "Taxpayer" is defined in the SBTA as "a person liable for a tax, interest or penalty under this act" and does not include credit unions which are exempt from tax. MICH. COMP. LAWS ANN. § 208.10(2).

24. MCL section 208.3(2) defines "business activity" as

> "[A] transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others."

MICH. COMP LAWS ANN. § 208.3(2).

25. *One's Travel Ltd.*, 288 Mich. App. at 63.

26. The court noted that Credit Union ONE had business activity as defined by the SBTA, because it transfers property and performs services within the state to the benefit of others. *Id.*

27. *Id.* at 64.

28. *Id.* (citing Alameda Gage Corp. v Dep't. of Treasury, 159 Mich. App. 693, 697 (1987)).

29. *Id.* (citing *Alameda Gage Corp.*, 159 Mich. App. at 693).

30. *One's Travel Ltd.*, 288 Mich. App. at 64.

commonality between the two cases was that Credit Union ONE did not have a SBT liability.[31] However, the lack of such liability was due to its status as a credit union, not because of the lack of in-state business activity.[32]

The case illustrates the efforts by taxpayers to attempt to qualify for the small business tax credit. The intent of the credit under the SBT was to limit the impact of the tax on those businesses that were deemed to be below the level that could shoulder the full burden of the tax.[33] This case provided a bit of a twist—with the parent company being a tax exempt entity, but the result was correct and should not have been a surprise. Even though tax exempt by statute, it is not unusual for an affiliate group to include a mix of both exempt and non-exempt entities.

B. Ford Motor Co. v. Department of Treasury

Cases continue to be heard challenging specific elements of the now defunct Single Business Tax Act, and the tax will continue to be a revenue source for the state until all open years and audits have closed.[34] One of the more interesting cases to be heard before the court of appeals during the *Survey* period regarded whether or not voluntary contributions made to an irrevocable trust created under the Voluntary Employee Benefit Association (VEBA)[35] would be considered "employee compensation"[36] that was taxable under the Single Business Tax Act.[37] The case is significant given the dollar value of such contributions, as well as the prevalent use of VEBA as a mechanism to ensure medical funding under employee benefit plans. "The Court of Claims [had] rejected [the] [P]laintiff's claim and granted summary disposition to [the]

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31. *See generally id.*

32. *See id.*

33. Under the Michigan Business Tax, there is a similar small business credit, which works to limit the reach of the tax, as well as act as a mechanism to reduce the effective rate of the MBT. The credit benefits those business whose receipts fall into the range of $350,000 (the minimum filing threshold) to $700,000 (where the benefit of the credit disappears completely and the full statutory rate applies). MICH. COMP. LAWS ANN. § 208.1417 (West 2007).

34. As of the 3rd quarter of 2010, the Single Business Tax (SBT) had brought in $11.1 million for the current fiscal year, and the total SBT revenue was $42.5 million. *Third Quarter State Revenues Take a Tumble*, 49 GONGWER NEWS SERVICE No. 153 (Aug. 9, 2010).

35. Internal Revenue Code, 26 U.S.C. § 501(c)(9) (2010).

36. "Employee compensation" is added to a taxpayer's SBT base. MICH. COMP. LAWS ANN. § 208.9(1), (5).

37. Ford Motor Co. v. Dep't of Treasury, 288 Mich. App. 491, 495 (2010).

[D]efendant."[38] An appeal was taken to the court of appeals, which reversed and held that voluntary contributions that Plaintiff made to the VEBA do not constitute "compensation" under the SBTA and, therefore were not subject to the Single Business Tax.[39]

The SBTA imposed a value added tax on any person engaged in business activity in Michigan.[40] As a value added tax, the SBT starts with a taxable base, and then adds to that base certain elements of value added by an employer.[41] Compensation paid to employees is an element of value to be added back and included in the SBTA base.[42] The controlling question in this case was whether or not the contributions to the VEBA trust were considered "compensation" within the statutory definition.[43] Noting that statutory language should be construed reasonably, the first criterion in determining intent is the specific language of the statute.[44] The court also noted that "[i]f the plain and ordinary meeting of the language is clear, judicial construction is neither necessary nor permitted."[45]

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38. *Id.* at 492.

39. *Id.* at 496.

40. A value added tax differs from an income tax because it is a tax on economic activity. 1975 Mich. Pub. Acts 228. "Whereas, an income tax is a tax on what has been received from the economy." TMW Enters. Inc. v. Dep't of Treasury, 285 Mich. App. 167, 173 (2009) (quoting Fluor Enters., Inc. v. Dep't of Treasury, 477 Mich. 170, 174 (2007)). *See also* ANR Pipeline Co. v. Dep't of Treasury, 266 Mich. App. 190 (2005).

41. MICH. COMP. LAWS ANN. § 208.9(5) (repealed 2007).

42. "Compensation" is defined under MCL section 208.4(3) as follows:

> Except as otherwise provided in this section, "compensation" means all wages, salaries, fees, bonuses, commissions, or other payments made in the taxable year on behalf of or for the benefit of employees, officers, or directors of the taxpayers and subject to or specifically exempt from withholding under chapter 24, sections 3401 to 3406 of the internal revenue code. Compensation includes, on a cash or accrual basis consistent with the taxpayer's method of accounting for federal income tax purposes, payments to state and federal unemployment compensation funds, payments under the federal insurance contribution act and similar social insurance programs payments, including self insurance, for worker's compensation insurance, payments to individuals not currently working, payments to dependents and heirs of individuals because of current or former labor services rendered by those individuals, payments to a pension, retirement, or profit sharing plan, and payments for insurance for which employees are the beneficiaries, including payments under health and welfare and noninsured benefit plans and payments of fees for the administration of health and welfare and noninsured benefit plans.

MICH. COMP. LAW ANN. § 208.4(3).

43. *Ford Motor, Co.*, 288 Mich. App. at 495.

44. *Id.* (citing *In re* MCI Telecomm. Complaint, 460 Mich. 396, 411 (1999)).

45. *Id.* (citing Nastal v. Henderson & Assoc. Investigations, Inc., 471 Mich. 712, 720 (2005)). "[E]very word or phrase of a statute should be accorded its plain and ordinary

Based on a number of factors, the court of appeals concluded that the Plaintiff's contributions to the VEBA trust were not "compensation to employees" under the SBTA.[46] The court found that contributions to the VEBA represented only potential compensation to the employees and the VEBA merely served as a savings fund, with its funds earmarked to facilitate the payment of employees' future health care services.[47] The court also found that employees received no substantial benefit until the VEBA directly paid the costs for the employees' healthcare services as required by the healthcare benefit plan.[48] The court further noted that "compensation" under the SBTA is defined to include "payments in the taxable year on behalf of or for the benefit of employees," and thus, only payments of actual healthcare costs incurred by Plaintiff's employees during the taxable year qualified as compensation.[49] The mere setting aside of monies which will serve as a future source of funds for the payment of future healthcare costs did not qualify as "compensation."[50]

While there was an intangible benefit received by the employees when the VEBA contributions were made, this benefit was merely peace of mind associated with knowing that the contribution to the VEBA was made; such benefit was not contained within the statutory definition.[51] The court also found it pertinent that the VEBA contributions were at risk to decrease in value depending on how the VEBA invested its assets, which contributed to the characterization of VEBA as representing only *potential* compensation, and not yet "compensation" includable in the SBTA base.[52] Lastly, the court noted that Plaintiff's contributions to the VEBA trust exceeded any compensation requirement under the UAW-Ford Motor Company contract.[53] As the payments to the VEBA were not required by any contractual obligation, they could not be considered "akin to purchasing health insurance."[54]

While the court of appeals reversed and remanded for further proceedings consistent with the opinion, the opinion was silent as to the next question likely to be raised.[55] If payments to the VEBA do not

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meaning, taking into account the context in which the words are used." *Id.* (quoting Priority Health v. Comm'r of Office of Fin. & Ins. Servs., 284 Mich. App. 40, 43 (2009)).

46. *Id.* at 496.
47. *Id.* at 497.
48. *Id.*
49. *Ford Motor Co.*, 288 Mich. App. at 497.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 498.
54. *Id.* at 499.
55. *Ford Motor Co.*, 288 Mich. App. at 499.

constitute "compensation" at the time they are paid into the VEBA (and for this the court's analysis is clear that such amounts at this time only represent potential future amounts), do they represent "compensation" when the VEBA actually pays to reimburse for qualified expenses under the Plaintiff's healthcare benefit plan? This would be the logical result, and could add a level of administrative complexity for open SBT years of those taxpayers who have made voluntary contributions into a VEBA. When such amounts are indeed used to reimburse for qualified costs, it would follow from the court's opinion that such amounts must then be added back to the SBT base. How this plays out in the future is puzzling given the repeal of the SBT and the closure of SBT years as time passes on. While recapture of investment tax credits ("ITC")[56] and capital acquisition deductions ("CAD")[57] under the SBT are addressed within the new Michigan Business Tax,[58] there is no such language regarding treatment of future VEBA payments for open SBT years. It will be interesting to see how this affects any future events on the part of Treasury to continue to monitor and audit for the Single Business Tax.

C. PNC National Bank Association v. Department of Treasury

This reported case is of a relatively straightforward issue applicable to only to financial institutions under the Single Business Tax.[59] However, it is insightful in the directness and analysis of the court in reaching its conclusion. The Plaintiff was appealing from a granting of the Department's motion for summary disposition before the court of claims.[60] The sole issue was whether interest earned from loans secured by real property located in Michigan, as well as interest earned from unsecured loans provided to Michigan customers, needed to be physically received within the State of Michigan in order to be included in the Plaintiff's SBT base.[61]

The Plaintiff's case rested on prior MCLA section 208.65,[62] which provides:

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56. MICH. COMP. LAWS ANN. § 208.23b (repealed 2007).

57. MICH. COMP. LAWS ANN. § 208.23 (repealed 2007).

58. MICH. COMP. LAWS ANN. § 208.1101-1601 (West 2007).

59. PNC Nat'l Bank Assoc. v. Dep't of Treasury, 285 Mich. App. 504 (2009).

60. PNC Nat'l Bank Assoc. v. Dep't of Treasury, No. 06-000009-MT (Ct. Cl. Jan. 22, 2008).

61. *PNC*, 285 Mich. App. at 505.

62. MICH. COMP. LAWS ANN. § 208.65, *repealed by* MICH. COMP. LAWS ANN. §§ 208.151-154 (West 2007).

> [T]he tax base of a financial organization attributable to Michigan sources shall be taken to be:
>
> (a) The entire tax base of a taxpayer whose business activities are confined solely to the state.
>
> (b) In the case of a taxpayer whose business activities are conducted partially within and partially without this state that portion of its tax base as its gross business in this state is to its gross business everywhere during the period covered by its return.
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> "Gross business of a financial institution" is defined by statute as the sum of:
>
> (i) Fees, commissions, or other compensation for financial services.
>
> (ii) Gross profits from trading and stocks, bonds, or other securities.
>
> (iii) Interest charged to customers for carrying debit balances of margin accounts, without deduction of any costs incurred in carrying the accounts.
>
> (iv) Interest and dividends received.[63]

Plaintiff PNC claimed that the above provision must be interpreted literally so as to only tax interest income physically received by PNC in the State of Michigan.[64] The Plaintiff alleged that if the Plaintiff did not come into physical possession of any cash or check used as payment on a loan within the borders of the state, it did not "receive" the interest income within the state, and therefore, such interest income was properly excludable from the tax base.[65] The term "received" was analyzed in great detail by the Plaintiff in its motion to the lower court.[66]

The court of appeals quickly disarmed any such interpretation. It noted that it would be illogical for the Legislature to have exempted

63. *PNC*, 285 Mich. App. at 506 (citing MICH. COMP. LAWS ANN. § 208.65).

64. *Id.* at 507.

65. *Id.*

66. The Plaintiff's basis for excluding the interest income was that payments for loans secured by Michigan real property or payments on unsecured loans for property in Michigan were sent to a lock box drop located out of state. *Id.*

interest income from tax solely because loan payments were sent to an out of state mailing address.[67] The Plaintiff's requested interpretation of the word "received" would set up a "perfect tax loophole: any financial institution could avoid paying taxes on interest earned from loans made to Michigan customers or secured by Michigan property simply by requiring its borrowers to mail their payment checks to a post office box in South Bend, Indiana, or Toledo, Ohio."[68] Relying on the definition of "gross business" contained within the statute,[69] the court noted that the interest income received by Plaintiff clearly fell within the meaning of gross business, and where the Plaintiff actually received the interest was irrelevant to the statutory scheme.[70] One wonders as to the reasoning in this case, until the finances of the matter are reviewed.[71]

The pay-to-play requirement to commence an action in the court of claims is onerous and contentious. The alternative forum would be to contest the assessment prior to payment at the Michigan Tax Tribunal. However, the Tribunal has limited experience in non-property tax matters, and there is no set timeline in which a litigant can expect to receive a decision. However, once a taxpayer pays the tax, there is often little to be lost in contesting the matter, especially if attorney's fees will be minimal compared to the tax and interest paid. In this case, once the decision was made to make the payment, the litigation was probably treated as a last attempt to effectuate a chance of settlement and obtain the return of some monies under the SBT. It is difficult to believe that simply the use of an out-of-state lock box could avoid the imposition of tax.[72] This statutory language does not exist under the MBT,[73] and financial institutions now pay a form of a net worth tax.[74]

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67. *Id.*

68. *Id.*

69. MICH. COMP. LAWS ANN. § 205.65.

70. *PNC*, 285 Mich. App. at 508.

71. At issue was more than $900,000 in taxes assessed for 1997-1999. In order to proceed to the court of claims, it was necessary to pay the tax, as well as interest due thereon. With well over $1 million dollars paid, it was well worth the litigation costs of challenging the assessment.

72. *PNC*, 285 Mich. App. at 507.

73. *See generally* MICH COMP. LAW ANN. § 208.1-145 (West 2007).

74. MICH. COMP. LAWS ANN. §§ 208.1261-.1269 (2003).

D. Midwest Bus Corp., f/k/a Midwest Bus Rebuilders Corp. v. Department of Treasury

The case of *Midwest Bus Corp.* addressed a sourcing issue under the SBT apportionment rules.[75] In doing so, the court relied upon sales and used tax case law to determine the characterization of the taxpayer's activities in order to determine which sourcing rule under the SBT should apply for apportionment purposes.[76] This cross application of case law between two different tax types is an application of first impression and raises many inquiries among practitioners.

Plaintiff was in the business of selling bus parts and remanufacturing buses.[77] In addition, Plaintiff performed other services, such as inspection, cleaning and certifying buses to meet remanufacturing standards.[78] To determine whether the revenue from such activities should be sourced to Michigan, where the services were performed, or to another state, where the buses were delivered, depended on whether Plaintiff's business activities were predominantly the selling of tangible personal property (the bus parts) or whether Plaintiff was predominantly in the business of providing services (remanufacturing).[79]

As previously covered in prior *Survey* editions, the SBT was a value added tax upon business activity.[80] The computation of the SBT begins with a computation of a taxpayer's tax base. If a taxpayer's business activities are confined to the state, the entire tax base is allocated to Michigan.[81] If the taxpayer's business activities are in Michigan as well as another state, only a portion of its tax base is allocated to Michigan because "a state may not tax value earned outside of its borders."[82] A formula is provided for apportioning a taxpayer's tax base between two

75. Although an unpublished court of appeals decision, leave to appeal before the Michigan Supreme Court is pending, and the case is included in this *Survey* as a case of first impression. The Plaintiff was appealing from an order granting Defendant's motion for summary disposition at the court of claims. It should be noted that members of the author's firm represented the plaintiff in this matter. Midwest Bus Corp. v. Dep't of Treasury, 288 Mich. App. 334 (2010).

76. *Id.*

77. *Id.* at 336.

78. *Id.* at 342.

79. *Id.* at 340.

80. The Single Business Tax Act, MICH. COMP. LAWS ANN. §§ 208.1-145 (West 1975), *repealed by* MICH. COMP. LAWS ANN. §§ 208.151-154 (West 2007). *See* Trinova Corp. v. Dep't of Treasury, 433 Mich. 141 (1989).

81. MICH. COMP. LAWS ANN. § 208.40.

82. *Midwest Bus Corp.*, 288 Mich. App. at 338. *See* MICH. COMP. LAWS ANN. § 208.41; *Trinova Corp.*, 433 Mich. at 151.

or more states.[83] Under the version of the SBTA applicable for the years in issue in the case, the formula was composed of three factors, the property factor, the payroll factor and the sales factor.[84]

The SBTA sales factor distinguishes between two types of sales: (1) sales of personal tangible property,[85] and (2) sales of other than sales of tangible personal property.[86] Sales of tangible personal property are considered to be in the state when the property is shipped or delivered to a purchaser in the state.[87] "Sales, other than sales of tangible personal property, are in this state if: (a) the business activity is performed in [Michigan] . . . [or] (b) the business activity is performed in [Michigan] and outside . . . [and] a greater proportion of the business activity is performed in [Michigan] than is performed outside this state."[88] Sales that are comprised of both tangible personal property as well as services rendered are referred to as "mixed transactions."[89] There is no specific sourcing rule for mixed transactions under the SBTA.[90]

The parties agreed that Plaintiff sold both bus parts and rehabilitative and other services.[91] Due to the lack of a mixed transaction sourcing rule under the SBT, the parties agreed that it was necessary to determine what the primary purpose of the transaction was in order to determine which apportionment rule would apply to the revenue associated with such sales.[92] Both parties agreed that the "incidental to the service test," set forth in *Catalina Marketing Sales Corp.*,[93] would be applied to determine

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83. *Midwest Bus Corp.*, 288 Mich. App. at 338.

84. MICH. COMP. LAWS ANN. § 208.45a. While a "three-factor" formula, the Michigan three-factor formula was not equally weighted between the property, payroll and sales factor. In its last year of existence (2007), the factors were weighted (a) Property 3.75%, (b) Payroll 3.75%, and (c) Sales 92.5%. *Id.*

85. MICH. COMP. LAWS ANN. § 208.52.

86. MICH. COMP. LAWS ANN. § 208.53.

87. MICH. COMP. LAWS ANN. § 208.52.

88. MICH. COMP. LAWS ANN. § 208.53.

89. *Midwest Bus Corp.*, 288 Mich. App. at 339. Mixed transactions involve elements of both sales of tangible personal property as well as sales of services. *Id.*

90. *See* MICH. COMP. LAWS ANN. §§ 208.1-145.

91. *Midwest Bus Corp.*, 288 Mich. App. at 337.

92. *Id.*

93. *Id.* (citing Catalina Mktg. Sales Corp. v. Dep't of Treasury, 470 Mich. 13). The *Catalina* case involved sales and use taxes. In *Catalina*, the court created a six part test to determine whether the tangible personal property delivered in a mixed transaction was incidental to the service provided. If tangible personal property was considered incidental to the service, then a mixed transaction would be deemed to be a service transaction. If the tangible personal property provided was not incidental to the service, then the transaction was deemed to be primarily a sale of tangible personal property. *Id.* For an analysis of the *Catalina* case, *see* John C. Cusmano, *Foreword: The Annual Survey of*

whether the transaction should be considered a sale of tangible personal property or whether the sale should be considered a sale of a service.[94] If, as Plaintiff argued, the sales were considered sales of tangible personal property, then such sales should be sourced outside of Michigan.[95] If the sales were considered sales of services, as the Department argued, then the sales should be sourced to Michigan, and would be included in the numerator of the Michigan sales factor, as the services were performed in the State of Michigan.[96] *Catalina* adopted the incidental to the service test for categorizing a business relationship that involves both the provision of services and the transfer of tangible property.[97] The *Catalina* test looks "objectively at the entire transaction to determine whether the transaction is principally a transfer of tangible personal property or a provision of a service."[98]

In *Midwest Bus*, the Plaintiff was advocating for the treatment of the sale as a sale of tangible personal property not includible in the Michigan sales apportionment factor and sourced to the state of Massachusetts.[99] The Department argued that the true object of the transaction was for the

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Michigan Law—Fifty Editions, and Still Counting, 2008 Ann. Survey of Michigan Law, 54 WAYNE L. REV. 1 (2008).

94. *Midwest Bus Corp.*, 288 Mich. App. at 337.

95. *Id.* Additionally, these sales are not included in the numerator of the Michigan sales factors under MICH. COMP. LAWS ANN. § 208.52. The sales under review by the court were ones in which the buses were delivered to Massachusetts. *Id.*

96. MICH. COMP. LAWS ANN. § 208.53.

97. *Catalina Mktg. Sales Corp.*, 470 Mich. at 24 (citing Univ. of Mich. Bd. of Regents v. Dep't of Treasury, 217 Mich. App. 665 (1996)).

98. *Midwest Bus Corp.*, 288 Mich. App. at 340 (citing *Catalina*, 470 Mich. at 24-25). The six part test can be broken down as follows:

> In determining whether the transfer of tangible property was incidental to the rendering of personal or professional services, a court should examine[:] [(1)] what the buyer sought as the object of the transaction[;] [(2)] what the seller or service provider is in the business of doing[;] [(3)] whether the goods were provided as a retail enterprise with a profit making motive[;] [(4)] whether the tangible goods were available for sale without the service[;] [(5)] the extent to which intangible services have contributed to the value of the physical item that is being transferred; and [(6)] any other factors relevant to the particular transaction.

Id.

99. To support its characterization as primarily a sale of tangible personal property, Plaintiff pointed to its contract that required Plaintiff to replace 427 parts on each bus, as well as provided for an additional 164 parts to be replaced as needed. *Midwest Bus Corp.*, 288 Mich. App. at 341. The Plaintiff alleged that this requirement clarified that "these 552 items of tangible personal property are the focus of the contract and that labor involved in their installation is incidental to the tangible personal property." *Id.* The Plaintiff also noted that the cost of tangible personal property was more than five times greater than the cost of the labor to support its argument that the tangible personal property was the substance of the transaction. *Id.*

buses to be refurbished and rehabilitated.[100] To support its position, the Department looked to the title of the contract, the contract definitions and the scope of services to be provided under the typical rehabilitation contract.[101] According to the Defendant, the tangible personal property installed under the contract was incidental to an exhaustive amount of extensive servicing of the buses.[102]

The court of appeals found that the remanufacturing contracts were predominantly for the provision of a rehabilitation service.[103] Because such services were performed in Michigan, it followed that the sales were to be sourced to Michigan and included in the numerator of the Michigan sales factor.[104] The court provided a complete and thorough analysis of each element of the *Catalina* six part test and concluded that the contract was not merely a contract for the purchase of bus parts with incidental services provided.[105] In applying the *Catalina* test to the apportionment rules of the SBTA, the court noted that under the

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100. *Id.* at 342.

101. *Id.* For the primary contract under review, the technical specification for services included such services as "(1) the restoration of items to new, as new, or reconditioned functionally . . . to the original manufacturers recommendations," (2) "the complete disassembly of an assembly or sub-assembly into its component parts . . . ," (3) "[t]he cleaning, inspection and qualification for repair or replacement of the component parts, and" (4) "[t]he reassembly of the component parts into complete assemblies." *Id.*

102. *Id.* at 342-43.

103. *Id.* at 343.

104. *Id.*; *see* MICH. COMP. LAWS ANN. § 208.53.

105. *Midwest Bus Corp.*, 288 Mich. App. at 343-49. In regards to the first factor, what the buyer sought as the object of the transaction, the court concluded that the buyer's object of the transaction was the service of having its buses rehabilitated, not merely to purchase brand new bus parts. With regard to the second factor, what the seller or service provider is in the business of doing, the court found that while the Plaintiff was engaged in both the retail business of selling bus parts and the remanufacturing of buses, the Plaintiff was actually selling the service of rehabilitation, i.e., disassembling, removing, repairing, inspecting, reconditioning, rebuilding, replacing, restoring, painting, servicing, cleaning, testing, and reassembling various components of the buses, and that the tangible personal property provided was to facilitate the required and desired servicing. *Id.* at 347-48. As to the third factor, whether the goods were provided as a retail enterprise with a profit making motive, the court agreed that although the bus parts could be purchased separately, the provision of the bus parts in the context of a rehabilitation contract was merely a means to accomplish "the contractual objective of rehabilitating the buses." *Id.* at 348. In regard to the fifth factor, the extent to which intangible services have contributed to the value of the physical item that is transferred, the court held that there would be no remanufacturing but for the service activities provided by the Plaintiff. Therefore, the remanufacturing contract was predominantly a contract for the provision of a service and should be sourced to Michigan where the service was performed. *Id.* at 348. The court felt that it had met the sixth prong of looking at all the facts and circumstances in determining the nature of the transaction. *Id. See* MICH. COMP. LAWS ANN. § 208.3(2), 208.54(b).

definition of "business activity" in the SBTA, the business activity in this case was incurred in Michigan regardless of the *Catalina* characterization of the transaction.[106] This was due to the court's analyses that there had been a transfer of legal or equitable title to the bus parts as each part was incorporated into the customer's bus.[107] Because this installation occurred in Michigan, the analyses followed that the "sale" of each bus part would have occurred in the state.[108] The court did not believe that subsequent delivery of the buses to the out-of-state owners would change their analysis. The sale of the bus parts was merely incidental to the service of actually performing the rehabilitation of the buses.[109]

While reasonable minds may differ as to the result in this matter, the case is troubling not for its holding, but for the application of a sales and use tax test to an issue regarding apportionment under the SBTA. The two taxes are very different—one is an excise tax and looks to whether or not sales tax applies to a transaction, while the second is a value added tax with sourcing dependent upon the characterization of the nature of the transaction. Although the six part test is convenient, and all practitioners love a bright line test, in this case it is dubious whether the use of the *Catalina* bright line test was appropriate in determining sourcing under the SBTA.

II. SALES AND USE TAX

A. Granger Land Development Co. v. Department of Treasury

A question regarding entitlement to the industrial processing exemption under the Use Tax Act ("UTA") was before the court of

106. "Business activity" is defined as "a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether an intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others, but shall not include the services rendered by an employee to his employer, services as a director of a corporation, or a casual transaction." MICH. COMP. LAWS ANN. § 208.3(2). Note, the Michigan Business Tax, MICH. COMP. LAWS ANN. §§ 208.1101-1601, does not recognize the casual transaction exception to "business activity." MICH. COMP. LAWS ANN. § 208.1105(1).

107. *Midwest Bus Corp.*, 288 Mich. App. at 346.

108. *Id.* at 343.

109. *Id.* at 346.

appeals in *Granger Land Development Company.*[110] The taxpayer believed that the materials and equipment were used in an industrial process and qualified for exemption from use tax. The Department believed that the materials were incorporated into real property and, thus, did not qualify for exemption.[111] In finding that the exemption applied, the court of appeals indicated their reliance upon certain relevant factors to assist in determining whether property will be considered real or personal for purposes of the industrial processing exemption under the UTA.[112]

The taxpayer owned and operated landfills in the state.[113] The personal property for which the exemption was claimed was used in the creation and maintenance of landfill cells.[114] The construction of a landfill cell was explained in detail in the opinion, and is useful to review as to the application of this case to other similar instances in which this issue could arise. In creating a landfill cell, an impermeable barrier is placed on the land.[115] Solid waste is then laid upon the barrier and crushed and compacted to ensure a relatively uniform layer of waste.[116] As the waste accumulates, horizontal pipelines are installed to capture the methane gas generated, as well as to capture and circulate lechate.[117] These horizontal wells are protected from subsequent layers of waste by covering them with tire chips.[118] Vertical wells are also installed to monitor gas levels.[119] The entire assembly is sprayed with an organic cover which helps prevent the waste from blowing away between deposits, and inhibits the escape of methane gas or the infiltration of oxygen.[120] Once a cell is filled to capacity, the cell is capped with non organic material to reduce outside air and filtration.[121] A second

110. Granger Land Dev. Co. v. Dep't of Treasury, 286 Mich. App. 601 (2009). The case was before the court of appeals on an appeal by the Department of Treasury from a taxpayer victory at the court of claims.

111. *Id.* at 609.

112. These factors had been highlighted by the Michigan courts in prior cases. *Id.* at 611.

113. *Id.* at 603.

114. *Id.* at 604. A landfill field cell consists of an impermeable barrier that is placed on an area of land up to several acres in size. This barrier is established to ensure that the significant amounts of waste water occurring at a landfill, known as lechate, does not contaminate ground water. The barrier also facilitates the capture and circulation of lechate which aides in methane gas production. *Id.*

115. *Id.*

116. *Granger Land Dev. Co.*, 286 Mich. App. at 604.

117. *Id.*

118. *Id.* at 604-05.

119. *Id.* at 605.

120. *Id.*

121. *Id.*

impermeable barrier is then placed over the cell "to prevent the escape of gas and the entry of water."[122] This second barrier is then covered with several feet of soil and plant vegetation to prevent erosion.[123] "A typical cell has a lifespan of 60 to 75 years before being closed and will continue to generate gas for another 30 years."[124]

The Department had assessed the taxpayer for sales and use taxes on the materials and equipment used or consumed in the operation of its landfills.[125] Granger paid the tax and sued for a refund, alleging that the materials and equipment used or consumed were used or consumed as part of its industrial process to generate gas and this was entitled to exemption under the UTA.[126] The Department believed that the equipment was not used in an industrial process, or in the alternative, that the industrial processing exemption under the UTA would not apply as the materials were incorporated into real property.[127] "The Court of Claims determined that the creation and maintenance of the landfill" itself constituted an industrial process, and also determined that the cells themselves were not affixed to real estate so they did not become part of its real property.[128] Accordingly, the court of claims found that "the materials used or consumed in the creation of the cells qualified" for exemption.[129]

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122. *Granger Land Dev. Co.*, 286 Mich. App. at 605.

123. *Id.*

124. *Id.* While some landfill operators burn methane gas when it reaches unsafe levels, the plaintiff in this case recovers the gas and sells it to a related company. The related company then burns the gas to generate electricity, which is then sold to a local utility. In addition, the lechate generated is circulated back into the landfill, which helps promote further gas production. *Id.* at 604.

125. *Id.* at 606.

126. *Id. See* MICH. COMP. LAWS ANN. § 205.94o (West 2003). Industrial processing is defined as "the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail." MICH. COMP. LAWS ANN. § 205.94o(7)(a). The Department dropped its challenge as to whether or not Granger was engaged in industrial processing.

127. Personal property that is not eligible for an industrial processing exemption includes "[t]angible personal property permanently affixed and becoming a structural part of the real estate . . ." MICH. COMP. LAWS ANN. § 205.94o(5)(a); property that is eligible for an industrial processing exemption includes "[t]angible personal property, not permanently affixed and not becoming a structural part of real estate, that becomes a part of, or is used and consumed in installation and maintenance of, systems used for an industrial processing activity." MICH. COMP. LAWS ANN. § 205.94o(4)(d).

128. *Granger Land Dev. Co.*, 286 Mich. App. at 607.

129. *Id.* It also found that Granger's use of its heavy equipment to design, construct and maintain the landfill also qualified as used within an industrial process. *Id.*

On appeal, the Department focused upon whether or not the taxpayer affixed the personal property that it used in the creation and maintenance of the landfill cells to real property, which would therefore be excluded from the industrial processing exemption.[130] The exemption for personal property used or consumed during industrial processing excludes personal property that is permanently affixed to and becomes a structural part of real estate.[131] This exemption is quantified twice within the UTA at both MCLA 205.940(4)(d) and MCLA 205.940(5)(a).[132] The court noted that there are a multitude of ways that one can affix personal property to real estate.[133] Although there is no bright-line test for determining whether, and when, an item of personal property has become sufficiently connected with real property that it should be treated as part of the real estate, the court relied upon the relevant factors that had previously been relied upon by the Michigan courts, and laid out those factors as a three part test:

> (1) whether the property was actually or constructively annexed to the real estate; (2) whether the property was adapted or applied to the use or purpose of that part of the realty to which the property in question is connected or appropriated; and (3) whether the property owner intended to make the property a permanent ascession to the realty.[134]

While the court noted that the application of the facts at hand to the three-part test was complicated given the scale of the processing activity, the sizeable area involved, the extent of the cells and the decades throughout which the processing activity continues, the court found that the taxpayer did not actually or constructively annex the cells or their components to the real property.[135]

The court noted that the taxpayer took "no affirmative steps to" attach the cells, that the cells facilitate the process and storage of the raw material used in the industrial process, and that the cells also facilitated

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130. *Id.* at 609.

131. *See* R.C. Mahon Co. v. Dep't of Revenue, 306 Mich. 660, 663 (1943).

132. *See* MICH. COMP. LAWS ANN. § 205.94o(5)(a).

133. Some items may be physically attached to the real estate whereas other items may be put in place with the intent that the property will become part of the real estate through its size and character. *Granger Land Dev. Co.*, 286 Mich. App. at 610; *see, e.g.*, Velmer v. Baraga Area Sch., 430 Mich. 385, 395 (1988).

134. *Granger Land Dev. Co.*, 286 Mich. App. at 611; *see also* Tuinier v. Bedford Charter Twp., 235 Mich. App. 663, 668 (1999).

135. *Granger Land Dev. Co.*, 286 Mich. App. at 611.

the processing of waste into gas that can be sold to third parties.[136] Based on these facts, the court found there had been no actual or constructive attachment of the cells to the real property.[137]

Under the second prong of whether the property was adapted or applied to the use or purpose of the realty, the court found that the taxpayer's erection and maintenance of the landfill itself did not constitute an adaptation of land. The court stated, "Granger adapts the land to facilitate the erection of cells; it does not erect the cells to facilitate the use of the land."[138]

Lastly, the court found that as to the third prong of the test, there was no evidence that "Granger intended the erection of the cells to be" a permanent ascession to the real estate.[139] The court conceded that while the cells might remain in place indefinitely, even after the expiration of their useful life, this did not amount to an ascession to the real estate.[140] The court believed that abandonment of the cells at some future point in time would be "akin to the onsite disposal of waste products by a traditional manufacturer."[141] Indeed, the court found that even if there was waste material left at the site after Granger abandoned the cells, this would not prohibit qualification for the exemption under the UTA during the current time, as the taxpayer intended to use, and actually does use, the personal property as part of an exempt industrial process for the period in which the exemption is claimed.[142]

The court found it noteworthy to indicate that permitting the UTA exemption also prevents the tax pyramiding that the Legislature intended to remediate "by enacting an industrial processing exemption."[143] This intent is also articulated in the legislative intent to the industrial processing exemption.[144]

Lastly, the court found that the taxpayer's use of bulldozers, compactors, and trash masters to process the waste also qualified for exemption under the UTA, as "industrial processing" is broadly defined

136. *Id.* at 612.
137. *Id.*
138. *Id.*
139. *Id.* at 613.
140. *Id.*
141. *Granger Land Dev. Co.*, 286 Mich. App. at 613; *see also* Minnaert v Dep't of Revenue, 366 Mich. 117, 122-123 (1962).
142. *Granger Land Dev. Co.*, 286 Mich. App. at 613.
143. *Id.* at 613 n.4 (citing Elias Bros. Restaurants, Inc. v. Dep't of Treasury, 452 Mich. 152 (1996)).
144. *Id.* at 608 (citing MICH. COMP. LAWS ANN. § 205.94o(1)(a)). Pyramiding refers to the avoidance of multiple layers of tax by exempting property used or consumed in the production of goods that will ultimately be subject to a use or sales tax when purchased by consumers.

to apply to the "conversion or conditioning of personal property."[145] The heavy equipment was clearly used as part of the industrial processing of the waste, and was not used to design, engineer, construct or maintain real property, which would have prevented the exemption from applying.[146]

The *Granger* case is significant, not just because of its holding in regards to real versus tangible property and related issues, but because of the clarity in which it indicates the broad reach of the industrial processing exemption under the UTA. The exemption, which was expanded by the Legislature in 1999, covers many processing activities in which manufacturers and other "industrial processors" may be engaged. The expansion of the industrial processing exemption was to broaden the exemption and provide tax relief to Michigan businesses that were engaged in a manufacturing or processing activity, as well as avoid tax pyramiding. However, the Treasury has been increasingly vigilant lately in its attempts to limit, in practice, the reach of the exemption. There has been a steady stream of audits and assessments that force manufacturers, processors and others to prove their entitlement to the exemption. While no one faults the State for carefully monitoring and policing exemptions, it is somewhat tiresome that such actions must continuously be contested in court as an unnecessary cost of doing business in the state. Perhaps a future administrative rule could assist in reducing the number of controversies regarding the industrial processing exemption, allowing the department's limited resources to be more effectively applied elsewhere.

B. General Motors Corp. v. Michigan Department of Treasury

The underlying issue in *General Motors Corp. v. Michigan Department of Treasury*[147] dealt with refunds for use tax filed by the Plaintiff.[148] The case is extremely noteworthy for its holding regarding

145. *Id.* at 614 (citing MICH. COMP. LAWS ANN. § 205.94o).

146. *Id.* at 614; *see* MICH. COMP. LAWS ANN. § 205.94o(3)(f), which defines industrial processing to include the "[d]esign, construction, or maintenance of production . . . ." *See also* MICH. COMP. LAWS ANN. § 205.94o(4)(b), which defines exempt property to include machinery used in industrial processing activity, as well as MICH. COMP. LAWS ANN. § 205.94o(4)(f), which includes within exempt property machinery used to move property in the process of production.

147. General Motors Corp. v. Dep't of Treasury, No. 07-151-MT, slip op. (Mich. Ct. Cl. April 17, 2009).

148. This matter was actually heard on cross motions for summary disposition and is unpublished. The Department's appeal to the court of appeals was heard on August 3, 2010. It should be noted that members of the author's firm represented the plaintiff in this matter.

the invalidity of a retroactive application of legislation, as well as the finding of the unconstitutionality of the legislation.

General Motors (GM) had requested a refund of use tax previously self-assessed and remitted on inventory vehicles that were used in their employee vehicle programs.[149] GM had filed the use tax refunds based on the matter of *Betten Auto Center v. Department of Treasury* in which the Michigan Supreme Court had affirmed that cars sold by a new car dealer are exempt from use tax liability when they are performing an interim use for which the resale exemption would apply.[150]

Betten resulted in a taxpayer victory, albeit short-lived. Subsequent to the judicial victory, the state, led by Treasury, introduced legislation to amend the Use Tax Act to prohibit refunds based on the *Betten* case.[151] House Bill 4882 was enacted on October 1, 2007, as 2007 PA 103 (the "Act"). Upon the passage of the Act, the Department denied GM's refund claims, basing the denial on the language and retroactive application of the Act.[152] GM then brought a motion challenging the retroactivity of 2007 PA 103, as well as its constitutionality.

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149. *General Motors Corp.*, No. 07-151-MT, slip op. at 2. Briefly, GM's vehicle programs operate as follows. Employees are provided a specific GM vehicle to drive as a condition to their employment. *Id.* The employees are required to perform evaluations of the vehicle's driving performance. *Id.* GM uses these evaluations in the marketing, testing, research and design of vehicles, as well as to collect data from real world vehicle use. *Id.* The vehicles are held by GM in inventory for resale, and are later sold to the final consumer. *Id.* During the time that an employee is assigned a vehicle under the program, the employee's family and household members are prohibited from driving the vehicles. *Id.*

150. Betten Auto Ctr. v. Dep't of Treasury, 478 Mich. 864 (2002). The *Betten* case had been very controversial. When appeals to *Betten* were pending, GM filed two use tax refund claims for open years which the Treasury placed in abeyance. The total amount requested to be refunded under the two refund claims exceeded $100 million. *General Motors Corp.*, No. 07-151-MT, slip op. at 2. The first refund claim was filed on August 25, 2006, and the second refund claim was filed on September 14, 2007. *Id.* The claims were for the period October 1, 1996—August 31, 2007. *Id.* The refund periods were open under waivers executed by GM and the Department of Treasury. *Id.*

151. H.R. 4882, 9th Leg., 1st Reg. Sess. (Mich. 2007). This has been a disturbing trend over the past few years—states negating taxpayer judicial victories with retroactive legislation. *See* Kmart Mich. Prop. Serv., L.L.C. v. Dep't of Treasury, 283 Mich. App. 647 (2009), *appeal denied*, Kmart Mich. Prop. Serv., L.L.C. v. Dep't of Treasury, 485 Mich. 898 (2009); Miller v. Johnson Controls, Inc., 296 S.W.3d 392 (Ky. 2009), *cert. denied*, 130 S. Ct. 3324 (2010); S. Cent. Bell Tel. Co. v. Alabama, 711 So.2d 1005 (Ala. 1998), *cert. granted*, 524 U.S. 981 (1998).

152. The language of 2007 Mich. Pub. Act 103 clarified that an interim exempt use, similar to the use by GM employees under the vehicle programs, made the vehicles ineligible for the resale exemption and, therefore, prohibited a use tax refund. *General Motors Corp.*, No. 07-151-MT, slip op. at 2. Enacting Section 2 of the Act made the amendments effective retroactively, beginning September 30, 2002, and for all tax years not barred by the applicable statute of limitations. *Id.* at 9. The legislation, while on its

The U.S. Supreme Court's lead case regarding the retroactive application of a tax law is *United States v. Carlton,* which only permits a retroactive application when there is a "modest" period of retroactivity.[153] GM argued that the more than 11 year retroactive application of the Act failed to meet the *Carlton* standard, and therefore clearly violated the Plaintiff's due process.[154] In addition, GM argued that the enacting sections of the Act violated Michigan's constitutional prohibition against special legislation.[155] Since the retroactive provision contained in Enacting Section 2 of the Act only denied refunds to GM, and was not shared by other taxpayers, the law qualified as a "special act." Special acts require a supermajority vote of the Michigan Legislature for passage, and absent a supermajority vote, which had not occurred, the specific Enacting Section was invalid, causing the legislation to fail.[156]

The Department arguments were as expected, claiming that the Act was not special legislation but simply an amendatory act clarifying that anyone who acquires tangible personal property for an exempt use under the Use Tax Act, and subsequently converts such property to a taxable use, is liable for use tax.[157] The Department argued that the change in law did not alter the long-held expectation of GM, since they had

face appearing retroactive to September 30, 2002, it was, in fact, effectively retroactive for 11 years, as GM had executed waivers under the applicable statute of limitations for use tax. *Id.*; *see* H.R. 4882, 9th Leg., 1st Reg. Sess. (Mich. 2007).

153. United States v. Carlton, 512 U.S. 26 (1994). *Carlton* established a two-part Due Process test that requires a legislature to act promptly in enacting retroactive economic legislation, and limits the period of retroactivity to a short "modest" period in order to avoid Due Process violations. *General Motors Corp.*, No. 07-151-MT, slip op. at 5 (citing *Carlton*, 512 U.S. at 30-33). This test applies whether subtle expectations are disturbed or not.

154. *General Motors Corp.*, No. 07-151-MT, slip op. at 5. The court of claims noted that no Michigan appellate case had yet interpreted *Carlton* and that Michigan case law decided prior to *Carlton* is no longer controlling.

155. The Michigan Constitution, article IV, section 29 provides: "The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general can be made applicable shall be a judicial question." *Id.*; *see General Motors Corp.*, No. 07-151-MT, slip op. at 5-6. The Constitution further provides that a "special act" is a "law that operate[s] upon only a portion of the people of the state by granting to them rights, privileges, or immunities not enjoyed by the whole people or imposing a burden or obligation not borne by all the people." *General Motors Corp.*, No. 07-151-MT, slip op. at 6 (citing Tribbet v. Village of Marcellus, 294 Mich. 607, 618 (1940)).

156. MICH. CONST. art. IV, § 29.

157. *General Motors Corp.*, No. 07-151-MT, slip op. at 6-8.

originally self-assessed and paid the use tax and were only seeking a refund upon the decision in *Betten*.[158]

The court of claims made short shrift of the Department's arguments and firmly held that the Act was unconstitutional as it violated both the Plaintiff's due-process rights and privileges under *Carlton*, as well as Michigan's constitutional prohibition against special legislation.[159] In weighing whether the retroactive period of the Act was modest, the court of claims considered the amount of time that the Act would apply retroactively in fact, and not the amount of time that it was retroactive as written. As written, the Act applied retroactively back to 2002 and for all open years under the statute of limitations. However, as GM and the Department had executed waivers keeping GM's use tax years open back 11 years, the court of claims found that it was this 11-year period that was controlling to determine whether or not the retroactivity was of a "modest period" as required by the U.S. Supreme Court in *Carlton*.[160] The court of claims found that 11 years could not be considered a modest period of retroactivity.[161]

As to whether the Act was in violation of Michigan's constitutional prohibition against special legislation, the court of claims found that while the language of the Act appeared to apply generally, its application in fact was directed only at GM.[162] The court noted that at the time the law was enacted only GM had filed refund requests pending based on the holding in *Betten*.[163] The court found it disturbing that the legislation had been written for the sole purpose of preventing GM from receiving a use tax refund due to a judicial interpretation of the Use Tax Act unfavorable to the state.[164] The court found that, without a doubt, the legislation constitutes special legislation in violation of article 4, section 29 of the Michigan Constitution.[165]

The opinion noted that it was particularly disturbing that the legislative body as a whole had passed the Act by primarily ignoring the committee process to avoid public notice. The court of claims found that

158. *Id.* at 7.

159. *General Motors Corp.*, No. 07-151-MT, slip op. at 8-10. *Carlton*'s two-part test was paraphrased by the court of claims as "First, "Congress' purposes in enacting the amendment was neither illegitimate nor arbitrary," and "[S]econd, Congress acted promptly and established only a modest period of retroactivity." *Carlton*, 512 U.S. at 32; *see General Motors Corp.*, No. 07-151-MT, slip op. at 8.

160. *General Motors Corp.*, No. 07-151-MT, slip op. at 9.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

although the legislature can lawfully avoid proposed legislation being heard in committee (by discussing the legislation on the Senate and House floors prior to voting), it found that it "is clear the act of avoiding the committee process in this legislation . . . was to ensure the 'special legislation' against GM was in place immediately with a blind eye to the public."[166] A troubling lack of transparency indeed.

The opinion of Judge Aquilina must be applauded and, one hopes, will be affirmed upon appeal.[167] It is not right for a taxpayer to have its day in court, only to have its judicial victory and refund stolen by the Legislature. Specific retroactive legislation in the tax arena is becoming so prevalent that it appears that a judicial victory is simply a required step in the legislative process. While states may pass retroactive legislation, the challenge of what constitutes a "modest period" of retroactivity is an issue that is at the forefront of the state judicial process.[168] A just government does not keep taxes to which it is not entitled.[169]

III. OTHER

A. Wolf v. City of Detroit

In *Wolf v. City of Detroit*,[170] the court of appeals reviewed again the question of when a fee is a fee, and when it constitutes a disguised tax.[171] This issue is raised occasionally, but one suspects it will be raised with more frequency in the years ahead as more and more states look to alternative revenue sources, such as increases in fees, to meet state budgets. In *Wolf*, the court of appeals upheld the criteria established by the Michigan Supreme Court in *Bolt v. City of Lansing* in determining when a "fee" is a "fee" and not "a tax."[172]

The Michigan Constitution prohibits the imposition of a new tax without a vote of the electorate.[173] The fee discussed in *Wolf* was the City

166. *General Motors Corp.*, No. 07-151-MT, slip op. at 10.

167. The court of appeals reversed. ___ N.W.2d ____, No. 291947 (Mich. Ct. App. Oct. 28, 2010). An appeal to the supreme court is pending. 793 N.W.2d 436 (Mich. 2011).

168. *General Motors Corp.*, No. 07-151-MT, slip op. at 9-10.

169. Pittsburg & Midway Coal Min. Co. v. Ariz. Dept. of Revenue, 776 P.2d 1061, 1065 (Ariz. 1989).

170. 287 Mich. App. 184 (2010).

171. *Wolf*, 287 Mich. App. at 187.

172. *Id.* (citing Bolt v. City of Lansing, 259 Mich. 152, 154, 158-159 (1998)).

173. MICH. CONST. art. IX, § 31 (commonly referred to as the "Headlee Amendment").

of Detroit solid waste inspection fee enacted in June of 2006.[174] Prior to that date, the City collected a three million dollar tax on certain commercial businesses to finance a portion of its solid waste collection, disposal, and inspection operations.[175] In 2006, the City replaced the revenue with (1) an increase in its commercial solid waste charges, (2) a $300 annual fee for residential trash collection service per resident, and (3) a new solid waste inspection fee.[176] The purpose of the solid waste inspection fee was to "insure proper solid waste removal services exist."[177] Together with the revenue generated from the annual residential trash collection fee and the commercial solid waste charges, the new solid waste inspection fee was estimated to collect approximately $74 million.[178]

Plaintiff owned three commercial properties within the City of Detroit.[179] All three properties relied upon the City to provide waste collection services.[180] Two of the properties were charged a solid waste fee, while one of the properties was charged only the solid waste inspection fee.[181] The Plaintiff later received a letter from the City indicating the City had erroneously charged the inspection fee on the property that participated in the City collection services and that instead, that property should have also been billed the solid waste collection fee.[182] Upon receiving a bill crediting the prior inspection fee and imposing the solid waste collection fee, the Plaintiff commenced this action for declaratory judgment, claiming the new solid waste inspection fees had all the indicia of a tax rather than a fee.[183]

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174. DETROIT, MICH. CODE, § 22-2-56 (2009).

175. *Wolf*, 287 Mich. App. at 188. The $3 million tax [was] "levied on commercial businesses and apartment buildings containing more than five units." *Id.* The tax generated approximately $8 million in revenue annually. *Id.* In 2006, the City discontinued the tax for the 2007-2008 fiscal year budget, as it failed to generate sufficient revenue to provide free residential trash services and other essential services. *Id.*

176. *Id.*

177. *Id.* at 189; *see* DETROIT, MICH. CODE, § 22-2-56.

178. *Wolf*, 287 Mich. App. at 189. Ordinance section 22-2-56(c) was later amended to authorize the City to impose an annual inspection fee. It was not fixed in nature, and set on a sliding scale based on the commercial square feet of the property. It was not clear under the Ordinance whether the inspection fee would be applied to all applicable properties or only to those properties that utilize a private waste disposal service. *Id.* at 188-89. Once the inspection fee was implemented, it was only charged to those properties that contracted with private solid waste disposal services. *Id.* at 193.

179. *See id.* at 194.

180. *Id.*

181. *Id.* at 194-95.

182. *Id.*

183. *Id.* at 195. The Plaintiff asserted that:

The City contended that the new waste inspection fee did not constitute a disguised tax.[184] The fee had been authorized by the Detroit City Council for the regulatory purpose of insuring efficient removal of solid waste.[185] The funds generated from the fee were used to defray the costs "of executing and maintaining a regulatory program," resulting in a fee that was proportionate to the costs.[186] The City noted that the fee does not generate general fund revenue and did not replace a tax, and that the fee benefits the fee payer by permitting the property owner to use private refuse collection companies and to avoid blight.[187] Finally, the City noted that the new solid waste inspection fee was voluntary, as a property owner could avoid "the fee by contracting with the city for solid waste disposal services."[188]

The seminal case in Michigan regarding the distinction between a fee and tax is *Bolt v. City of Lansing*, where the Michigan Supreme Court explained the distinction between a fee and a tax as follows: "Generally a 'fee' is 'exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit.' A 'tax' on the other hand, is designed to raise revenue."[189] In *Bolt*, the supreme court identified three criteria to determine if a fee existed.[190] *Bolt* also identified the factors that a court may consider in evaluating these criteria.

> (1) the fee has no relation to any service or benefit actually received by the taxpayer; (2) the amount of the fee has no relation to the cost incurred by the City in performing any service; (3) the fee was nothing more than a mechanism designed to generate revenue . . . ; (4) the payor of the fee benefits in no manner distinct from any other taxpayer; (5) the fee is not voluntary, but mandatory; (6) the fee is not paid because of a use or service but because of a status as a property owner; and (7) failure to pay the fee can result in the city placing a lien on the subject property.

Id. at 197.

184. *Wolf*, 287 Mich. App. at 197.

185. *Id.*

186. *Id.* To assist in setting the fee, the City had developed a set of sliding scales with the assistance of a consultant. The fee scale was later reduced and then eliminated, as the City refined its analysis of the actual costs of performing the inspections.

187. *Id.* at 198.

188. *Id.*

189. Bolt v. City of Lansing, 459 Mich. 152, 161 (1998).

190. *Id.* at 161-162. These criteria are: (1) a fee serves a regulatory purpose, (2) a fee is proportionate to the necessary cost of that service, and (3) a fee is voluntary. *Id.* The supreme court noted "these criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge at issue is not a fee," Graham v. Kochville Twp., 236 Mich. App. 141, 151 (1999) (citing *Bolt*, 459 Mich. at 167).

Turning to the first criteria, that a fee has a regulatory, rather than a revenue-raising purpose, the court of appeals found that the new solid waste inspection fee satisfied this criteria.[191] The language of the Ordinance, as well as the further amendments, bolstered "the contention that the fee serves and furthers a regulatory purpose . . . to ensure the efficient removal of solid waste products and to protect the public health by reducing blight and illegal dumping."[192] The court noted that even though the City failed to inspect all the properties on which it collected the inspection fee, such failure by the City was more likely due to the initial task associated with implementation of the inspection process then any intent by the City to simply raise revenue.[193]

As to the second criterion, the court presumed that the amount of the fee is reasonable unless the contrary appears on the face of the law itself or is established by proper evidence.[194] The court found the sliding fee scale adopted by the Detroit City Council showed an intent to make the fee proportionate to the services provided.[195] Even though the City never implemented this initial fee schedule, further cost analysis performed by the City supported the intent to reflect within the inspection fee "the direct and indirect personnel and overhead costs associated with the verification and inspection process."[196] At the time of the court's review, the City had indicated its intent to further reduce the inspection fee to a flat $200 per parcel.[197] The court found that the fact that the City intended to reduce the amount charged to a single flat fee was a strong indicator "that the fees actually charged had been disproportionate."[198] Nevertheless, the court relied upon affidavits and deposition testimony from a City employee and an expert hired by the City to investigate the reasonableness of the cost analysis performed by the City, and found that such affidavits and deposition testimony indicated the City's good faith attempt "to determine a reasonable fee based on the information then existing and available to them."[199]

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191. *Wolf*, 287 Mich. App. at 200-1.

192. *Id.* at 201 (citing Wheeler v. Shelby Charter Twp., 265 Mich. App. 657, 665 (2005); Peninsula Sanitation, Inc. v. Manistique, 208 Mich. App. 34, 40-41 (1994)).

193. *Wolf*, 287 Mich. App. at 203.

194. *Id.* at 207 (citing *Wheeler*, 265 Mich. App. 665-6 (quoting *Graham*, 236 Mich. App. at 154-5 (quoting Vernor v. Sec'y of State, 179 Mich 157, 168 (1914)))).

195. *See Wolf*, 287 Mich. App. at 208-9.

196. *Id.* at 208. Beginning with the 2009-2010 fiscal year.

197. *Id.* at 208-09.

198. *Id.* at 209.

199. *Id.* The latitude provided by the court is apparent. The court noted that the evidence suggests the City's lack of preparedness to implement the process and its resulting inept launching of the inspection process may have caused the fees to be

In regards to the final criteria under *Bolt* of whether the fee is voluntary, the court found that the City was correct in arguing that any property owner can choose to avoid the fee simply by "contracting with the Department of Public Works for solid waste collection and disposal services."[200] In what surely must have provided the City with a sigh of relief, the court of appeals found that all the *Bolt* criteria had been met and that the new solid waste fee constituted a proper fee to serve a recognized regulatory purpose.[201] If the fee had failed under the *Bolt* criteria, the City would have been left with yet another hole to plug in its seemingly bottomless deficit. We all must pay for organized society, as well as waste disposal.

B. Flint Cold Storage v. Department of Treasury

While not technically a tax case, the matter of *Flint Cold Storage*[202] is included in this *Survey* section as one of the very rare cases dealing with the Michigan Uniform Unclaimed Property Act ("UUPA").[203] The UUPA is administered by the Department of Treasury. It is not often that we have cases on this subject matter, and given the recent activity in this area by the Department of Treasury, coverage of this case is timely and reveals some very interesting facts.

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disproportionate but that the result of such actions did not evidence "an attempt on the part of the City to generate a revenue stream outside its taxing power by subterfuge." *Id.*

200. *Id.* at 209-10. The court found the other factors raised by the Plaintiff did "not transform an otherwise proper fee into a tax." *Id.* at 210.

201. *Wolf*, 287 Mich. App. at 210. Although the court of appeals did not fail once again in their opinion to indicate how poorly launched the implementation of the fee had been. *Id.*

202. Flint Cold Storage v. Dep;t of Treasury, 285 Mich. App. 483 (2009).

203. The Michigan Uniform Unclaimed Property Act ("UUPA") is contained in MCL sections 567.221-65 (West 2010). The UUPA applies to both tangible and intangible property in the possession of a holder. Holder is defined at MICH. COMP. LAWS ANN. § 567.222(h) as a "person, wherever organized or domicile, who is . . . [i]n possession of property belonging to another." Most property is given a five-year dormancy period prior to being remitted to the State. Thus, any property that is held by a holder "in the ordinary course of a holder's business and remains unclaimed by the owner for more than 3 years after it becomes payable or distributable is presumed abandoned." MICH. COMP. LAWS ANN. § 567.223(1). Other types of property are given different periods of abandonment. For example, payroll checks are presumed abandoned after one year, MICH. COMP. LAWS ANN. § 567.236(1), and funds distributed in the course of the demutualization of an insurance company are presumed abandoned two years after the date of demutualization. MICH. COMP. LAWS ANN. § 567.228b(1)(a). Once property is presumed abandoned, it is then subject to the custody of the State if certain conditions of the Act are met. The property is then paid or delivered to the state Treasurer or to the treasurer of any other state based on the last known address of the owner. MICH. COMP. LAWS ANN. § 567.240(1).

Flint Cold Storage had been a closely held Michigan corporation that engaged in business from the late 1940s through October of 1975, at which time the company was dissolved.[204] Prior to its dissolution, Plaintiff had purchased a life insurance policy on the life of its president from the Metropolitan Life Insurance Company ("Met Life").[205] In 2000, Met Life demutualized and distributed the demutualization funds to its policyholders.[206] This change in corporate identity required the relinquishment of mutual membership interests in the mutual insurance company, regardless if such action was taken in conjunction with a form of reorganization or other action.[207]

At the time Met Life distributed the demutualization funds to its policyholders, it had been unable to locate Flint Cold Storage, as the company had, at that point, been dissolved for 25 years. Pursuant to the UUPA, Met Life therefore remitted the $188,679.99 in demutualization funds to the Michigan Unclaimed Property Division.[208] In 2003, the president of Flint Cold Storage passed away, and was "survived by his wife and son."[209] When they learned of the demutualization funds held by the State of Michigan, the widow attempted to claim such funds "in her capacity as an officer of the dissolved corporation."[210] For documentation to support her claim, "a copy of Flint Cold Storage's 1975 Annual Report" was presented.[211] "[N]o proof of the identity of the historic shareholders of Flint Cold Storage" was provided, nor were copies of "any bylaws, board meeting minutes, stock certificates, tax returns, or other annual reports of Flint Cold Storage."[212]

On May 7, 2007, the Department of Treasury, Division of Unclaimed Property, denied the claim, as it was unable to confirm the rights of the

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204. *Flint Cold Storage*, 285 Mich. App. at 485.

205. *Id.*

206. *Id.* Demutualization is the process of converting from a mutual life insurance company, which is owned by policyholders, to a stock insurance company, which is owned by shareholders.

207. *Id.*; MICH. COMP. LAWS ANN. § 567.228b(3). *See also* Bank of New York v. Janowick, 470 F.3d 264, 267 (6th Cir. 2006).

208. *Flint Cold Storage*, 285 Mich. App. at 486. The UUPA requires that funds distributed in the course of a demutualization of an insurance company are to be presumed abandoned after two years from the date of demutualization if the owner has not yet otherwise communicated with the holder of the funds or its agent regarding the property. MICH. COMP. LAWS ANN. § 567.228b(1)(a).

209. *Flint Cold Storage*, 285 Mich. App. at 486.

210. *Id.*

211. *Id.*

212. *Id.*

widow to the funds.[213] The company then brought suit in the court of claims, alleging that it was the rightful owner of the fund, and that there were no other claimants.[214] The Department maintained that it was unable to release the funds to the claimant as it could not ascertain the identity of the corporation's owners for any year other than 1975, and had no information regarding the historic shareholders of the company.[215]

The "Plaintiff moved for summary disposition . . . arguing that it was beyond genuine factual dispute that Flint Cold Storage was the rightful owner of the unclaimed funds."[216] Although it had dissolved in 1975, the company asserted that it had statutory authority "to continue doing business after dissolution for the purpose of collecting its assets."[217] The Department filed a cross motion for summary disposition and alleged that Flint Cold Storage "lacked the capacity to sue as it no longer existed."[218] The Department acknowledged that while a dissolved corporation is given statutory authority to continued operations to wind up its affairs upon dissolution,[219] "the company could not possibly be still winding up its affairs more than 32 years after dissolution" and, therefore, had "ceased to exist as a legal entity."[220] As it no longer existed as a legal entity, the Department "argued that Flint Cold Storage no longer possessed the power to sue and be sued."[221] The Department argued that without an authorized corporation, there were no authorized officers, and therefore, it was the historic shareholders that were entitled to the funds, not the widow.[222]

The circuit court granted summary disposition in favor of the Department, noting, however, that "it seems like the equities are with the

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213. *Id.* at 487. It was discovered that the State itself also had no records concerning Flint Cold Storage Company. *Id.*

214. *Id.* The action was brought under MCL section 567.247. The UUPA requires an action challenging a decision of the Administrator of the Act "must be commenced within 90 days after the decision of the [state treasurer] or within 180 days after the filing of a claim if the [state treasurer] has failed to act" upon the claim. *Id.* at 494. In addition, the Act provides that "the court shall award the claimant costs and reasonable attorney's fees." *Id.*

215. *Flint Cold Storage*, 285 Mich. App. at 487.

216. *Id.* at 488.

217. *Id.* The company also provided additional information to indicate that the widow and son of the president "had been authorized to act on behalf of the corporation before its dissolution." *Id.*

218. *Id.* at 489.

219. *Id.*

220. *Id.*

221. *Flint Cold Storage*, 285 Mich. App. at 489.

222. *Id.* at 487.

Plaintiff, and I don't find the law particularly illuminating."[223] The court's analysis centered on interpreting the Business Corporation Act regarding a dissolved corporation's abilities to continue its corporate existence for the purpose of winding up its affairs.[224]

As a brief tutorial to practitioners who may not have had the opportunity to practice in the area, unclaimed property refers to amounts held by "holders" on behalf of "owners." If, after a certain period of time, the holders are unable to return the funds to their rightful owners (referred to as a dormancy period), the monies are then turned over to the State's Division of Unclaimed Property for safekeeping. The Act also creates a cause of action for claimants whose claims are denied or not timely processed or by persons agrieved by a decision of the administrator under the Unclaimed Property Act.[225]

The court of appeals undertook the review of whether or not Flint Cold Storage still continued to exist as a legal entity beyond the date of its 1975 dissolution, and, if it did, whether it had the capacity to commence the action to claim the UUPA funds.[226] The court began its analysis with a review of the Business Corporation Act governing the dissolution and winding up of Michigan corporations.[227] The Business Corporation Act provides that although a dissolved corporation shall carry on its corporate existence, it shall not be permitted to carry on business except for that necessary for the purpose of winding up its affairs.[228] It was clear to the court of appeals that while a dissolved Michigan corporation may continue to exist beyond its date of dissolution, such existence only continues until it has "concluded winding up its affairs."[229] While the Business Corporation Act provides no specific period in which a dissolved corporation must complete this

223. *Id.* at 490. Many practitioners may agree with the latter part of this statement.

224. MICH. COMP. LAWS ANN. § 450.1834: "Subject to section 833, and except as otherwise provided by court order, a dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if dissolution had not occurred." *Id.*; *see* MICH. COMP. LAWS ANN. § 450.1833.

225. MICH. COMP. LAWS ANN. §§ 567.221-65.

226. *See Flint Cold Storage*, 285 Mich. App. at 491-92.

227. *Id.* at 495. Chapter 8 of the Business Corporation Act provides: "A dissolved corporation, its officers, directors and shareholders shall continue to function in the same manner as if the dissolution had not occurred[,]" *id.* (citing MICH. COMP. LAWS ANN. § 450.1834), and that a "dissolved corporation may continue to 'sue and be sued in its corporate name . . . in the same manner as if dissolution had not occurred.'" *Id.* (citing MICH. COMP. LAWS ANN. § 450.1834(e)). *See also* Freeman v. Hi Temp Prods., Inc., 229 Mich. App. 92, 96 (1998) (stating that "the general rule is that a dissolved corporation can sue and be sued").

228. MICH. COMP. LAWS ANN. § 450.1833.

229. *Flint Cold Storage*, 285 Mich. App. at 496.

winding-up process, the court found that the omission of a time limitation does not permit a dissolved corporation to continue winding up its affairs indefinitely.[230] Absent any further guidance from the Legislature, the court found that a reasonable time must be implied.[231] What constituted a reasonable time is generally a question of law for the court, and the court could not envision a case in which a 32-year winding-up period would be considered reasonable.[232] Therefore, the court concluded that the corporation had lost its powers under the Business Corporation Act to sue and be sued.[233] As the company's corporate legal existence had terminated, and it lacked the legal capacity to sue and be sued, it also lacked the legal capacity to bring an action for the claiming of the unclaimed property funds.[234]

However, the court indicated that this should not foreclose the possibility that the funds could be reunited with their rightful owner(s). As provided under the UUPA, with the dissolution of Flint Cold Storage, the company's historic shareholders may be able to claim and successfully recover the unclaimed funds. As it was likely that the deceased individual's estate was a historic shareholder, it would be authorized to commence such an action for recovering property held in the name of the deceased, as could other historic shareholders, if any. The true problem in this case was that the action was commenced and prosecuted by the improper party.[235]

That was not all that was wrong with this case. As noted by the court, not only was the Plaintiff the wrong person to commence such action, but the Defendant had also initially been erroneously

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230. *Id.* at 497. The court of appeals did note that Michigan's former General Corporation Act had only permitted a dissolved corporation "three years after its date of dissolution for the winding up of [its] affairs." *Id.* at 496 (quoting former MICH. COMP. LAWS ANN. § 450.75); *see also* Striker v. Chesler, 42 Del. Ch. 578, 585-87 (1966) (interpreting Michigan's former General Corporation Act).

231. *Flint Cold Storage*, 285 Mich. App. at 497 (citing Christian v. Webster, 219 Mich. 37, 40 (1922); Mills v. Stankiewicz, 27 Mich. App. 483, 489 (1970)). *See also* Smith v. Michigan Basic Prop. Ins. Ass'n, 441 Mich. 181, 191 n.15 (1992).

232. *See Smith*, 441 Mich. at 191 n.15; S.C. Gray, Inc. v. Ford Motor Co., 92 Mich. App. 789, 817 (1979) (stating that "[w]here the facts are undisputed, the question of what is a reasonable time is a question of law"). The court noted that other jurisdictions have reached a similar conclusion (citations omitted).

233. *Flint Cold Storage*, 285 Mich. App. at 498 (citing BASF Corp. v. Central Transport, Inc., 830 F.Supp. 1011, 1012-1013 (E.D. Mich. 1993) (observing that "[u]nder Michigan law, [a dissolved corporation] can no longer be sued once it has completely wound up its affairs and distributed its assets").

234. *Flint Cold Storage*, 285 Mich. at 502.

235. *Id.* at 500-01.

identified.[236] Also problematic was the lack of documentation on the Plaintiff's part. It is understandable that 25 years after dissolution the widow of the company's president may no longer have robust documentation regarding the company's affairs, but one would expect that there were other ways in which to document who the historic shareholders of the company were. Plaintiff admitted this defect in documentation.[237] Fault can also be laid with the state, which admitted it "had either inadvertently destroyed its records concerning Flint Cold Storage," or it might have "destroyed them in the ordinary course of business."[238] The court did not address the lack of the Defendant's reliance upon the affidavit proffered by the widow. Given that this was a small family-held business, one would expect that the two parties could have resolved the issue of who the historic shareholders and rightful owners were by testimony and sworn statements.

There are many current matters that highlight the lack of any consistent process within the Department regarding unclaimed property. It appears that since 2003, when Met Life turned over to the State the demutualization funds payable to Flint Cold Storage, that the State made no true attempts to contact the business or the owner.[239] As a holder of the property for its safekeeping, one would expect that perhaps the State should have taken a more proactive role in attempting to reach out to any remnants of Flint Cold Storage. The case also notes a disturbing trend on the part of the State to forestall any payment of refunds or funds rightfully belonging to taxpayers or, in the case of unclaimed property funds, holders, placing the burden of proof upon the shoulders of the claimant.[240] While it is correct to place this burden there, it does appear there was testimony in this case, and an affidavit had been produced regarding who the rightful shareholders were.[241] While it could very well be that this affidavit would not be applicable when Flint Cold Storage was the claimant, the affidavit, by the widow, could have indicated the right of the estate of the deceased to the funds. One wonders why this matter was not resolved or why a second claim was not therefore filed and submitted, rather than taking this matter to court. While Plaintiffs may want to have their day in court, one can believe that an offer to

236. *Id.* at 485 n.1. Pursuant to the UUPA, actions brought in circuit court to recover unclaimed property must name the administrator as a defendant. That does not mean the Director of the Division, but the State Treasurer. MICH. COMP. LAWS ANN. § 567.222(a).

237. *Flint Cold Storage*, 285 Mich. App. at 487-88.

238. *Id.* at 486-87.

239. *See id.*

240. *See id.* at 494.

241. *Id.* at 490.

return the funds to the widow of the insured would have resolved this without the need for the State to expend resources upon litigation.

The state's activity in the area of unclaimed property has significantly increased, especially given the use of out-of-state third-party contingency auditors to audit on behalf of the State. Yet, there is very little guidance and no rules or regulations regarding how the UUPA is to be administered, and only a shadow staff of personnel devoted to this task. As noted by the court, the State Treasurer was "authorized to 'promulgate rules necessary to carry out the provisions of [the UUPA]' . . . but has" failed to do so.[242] The result of this is a black hole into which holders of unclaimed property, as well as claimants to unclaimed property, are left to the mercy of individual decisions being made within the Division without further review of those decisions unless an action is brought in circuit court. Some of the recent friction that has developed with the Unclaimed Property Division is due to this lack of guidance. Normally, when dealing with the Department of Treasury, taxpayers can rely upon well-structured guidelines and informal and formal procedures to help guide them through the bureaucratic morass. There are mechanisms in place to lead a person through an informal conference, a resolution process, or to settlement discussions. In addition, there is a Taxpayer Bill of Rights and other procedural safeguards contained within the Revenue Act.[243] But alas, herein lies the twist: unclaimed property is not a tax, and yet is administered by the Department of Treasury.

C. Expansion of Michigan Renaissance Zone Act

The Michigan Renaissance Zone Act has been amended to authorize the creation of up to 25 additional zones for border crossing facilities.[244] Creation of a border facility zone requires approval by the Michigan Strategic Fund, and the designation may last for 15 years.[245] To be considered a "border crossing facility" a business must be located in a "[q]ualified border local government unit" and must have been displaced or otherwise negatively affected by the development of "an international border crossing."[246] The business must be associated with international trade, shipping or freight hauling. The qualifying border local government units are Port Huron, Fort Gratiot Township and Port Huron Township.[247]

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242. *Id.* at 494 n.7.

243. MICH. COMP. LAWS ANN. §§ 205.1-.31 (West 2003).

244. 1996 MICH. PUB. ACT 376, amended by MICH. COMP. LAWS ANN. § 125.2688g(1).

245. Michigan Renaissance Zone Act, 1996 MICH. PUB. ACT 376, amended by MICH. COMP. LAWS ANN. § 125.2688g.

246. MICH. COMP. LAWS ANN. § 125.2688g(1), (6)(c)(b)(ii).

247. *See* Border Crossing Facility Ren. Zones H.B. 4723 (H-2): Analysis as Reported from Committee, Mich. S. Fiscal Agency, 95th Leg., 2010 Sess. (Feb. 2, 2010).