TAXATION

JASON C. LONG[†]

Table of Contents

I. INTRODUCTION

This article surveys developments in Michigan tax law from June 1,

---

[†] Associate, Steinhardt Pesick & Cohen, P.C. B.A., 1996, *cum laude*, Oakland University; J.D., 1999, *summa cum laude*, University of Detroit Mercy. Former Law Clerk to the Honorable Michael F. Cavanagh, Michigan Supreme Court. Member of the State and Local Taxation Committee of the State Bar of Michigan Real Property Law Section.

2003, through May 31, 2004. During that period, the Michigan courts decided several cases involving tax law, and the Michigan Legislature adopted a number of changes in tax statutes. The cases decided generally involve the taxation of property, including the Headlee Amendment, the single business tax, the fuel tax, and tax procedures. In addition to addressing several of those topics, the legislature also adopted changes to Michigan's income tax statutes and use tax statutes. This article will focus on developments affecting tax practice,[1] and will address the developments in the Michigan law of taxation by topic, with each topic addressing both the case decisions and legislative changes affecting that area of tax law.

II. PROPERTY TAX

Having long been the single largest tax imposed in Michigan,[2] property tax is perhaps the most important topic in Michigan tax law. Both the courts and the legislature addressed property tax matters during the *Survey* period. The courts addressed the manner that cooperatives may qualify for the homestead exemption, and matters regarding reversion and foreclosure. Later, the legislature renamed the homestead exemption, adopted new legislation for tax-reverted properties, and made other changes in the Michigan General Property Tax Act (GPTA).[3]

A. The Homestead Exemption

Generally, the homestead exemption provides that a taxpayer's principal residence is not subject to the "tax levied by a local school district for school operating purposes."[4] Under the statutory definition, a "homestead" can be "property owned by a cooperative housing corporation and occupied as a

---

1. Thus, judicial decisions and legislative changes regarding appropriations and intra-governmental distributions of tax revenue are not addressed in this article. Several decisions addressing statutory provisions that are no longer in effect have also been omitted.

2. Total property tax revenue collected in Michigan dwarfed the revenue collected based on city income taxes, state income taxes, the single business tax, and the sales and use tax. *See* MICHIGAN LEGISLATIVE SERVICE COMMISSION, MICHIGAN MANUAL 1999-2000, 965-72 (2000).

3. MICH. COMP. LAWS ANN. §§ 211.1-211.157 (West 2002).

4. MICH. COMP. LAWS ANN. § 211.7cc (West 2002), *amended by* 2003 Mich. Pub. Acts 140. *See also* MICH. COMP. LAWS ANN. § 211.7dd (West 2002) (defining "homestead" as a dwelling occupied as the owner's principal residence).

principal residence by tenant stockholders."[5] In *Inter Cooperative Council v. Department of Treasury*,[6] the court of appeals addressed the meaning of "cooperative housing corporation." There, the Inter Cooperative Council (ICC), a "non-profit cooperative membership corporation" that owned seventeen houses in Ann Arbor that were occupied by persons that had purchased ICC shares,[7] claimed homestead exemptions for each of its houses. Both the Department of Treasury and the Tax Tribunal denied the ICC's claims.[8]

The ICC appealed, and the court of appeals held that the term "cooperative housing corporation" in the homestead exemption must be given the meaning ascribed to that term in the federal internal revenue code.[9] The GPTA does not define "cooperative housing corporation," leading the ICC to argue that any such corporation qualifies for the exemption. However, the court of appeals disagreed, and declined to use the definition of "cooperative corporation" from the General Corporation Act,[10] or the definition of "consumer cooperative" from the Consumer Cooperative Act,[11] when applying the homestead exemption. The court of appeals held that both statutes relate to corporate regulation, while the GPTA controls taxation of property. As such, the court held that the corporate statutes are not *in pari materia* with the GPTA, so it did not read them *in pari materia* with the GPTA.[12]

Rather, the court's decision was based on reading the GPTA *in pari materia* with the Michigan Income Tax Act (MITA),[13] which provides a homestead tax credit against Michigan's income tax.[14] The court held that both statutes favor "homestead" owners in a tax context, and define "tenant stockholders" of "cooperative housing corporation[s]" as "homestead" owners.[15] Further, though the MITA does not define "cooperative housing

---

5. MICH. COMP. LAWS ANN. § 211.7dd(*a*) (West 2002).

6. 257 Mich. App. 219, 668 N.W.2d 181 (2003).

7. *Id.* at 221, 668 N.W.2d at 183.

8. *See id.* at 220-21, 668 N.W.2d at 182-83.

9. *See id.* at 226-27, 668 N.W.2d at 185-86.

10. MICH. COMP. LAWS ANN. §§ 450.98-.192 (West 2002).

11. MICH. COMP. LAWS ANN. §§ 450.3100-.3192 (West 2002).

12. *See ICC*, 257 Mich. App. at 226-27, 668 N.W.2d at 185-86.

13. MICH. COMP. LAWS ANN. §§ 206.1-.532 (West 2002).

14. *See Inter Coop. Council*, 257 Mich. App. at 226, 668 N.W.2d at 185.

15. *Id. See also* MICH. COMP. LAWS ANN. §§ 206.508 & 206.510 (West 2002) (defining "homestead" and "owner," respectively).

corporation," it generally incorporates the definitions from the Federal Internal Revenue Code.[16] The court of appeals affirmed the Tribunal's use of the federal definition of "cooperative housing corporation," which requires that each stockholder must be entitled to occupy an "independent housekeeping unit" rather than share facilities for cooking and sanitation.[17] Because the ICC's tenant stockholders shared such facilities at the ICC's houses, the ICC could not claim homestead exemptions for its houses.[18]

In deciding *Inter Cooperative Council*, the court of appeals acknowledged that tax exemptions "are strictly construed in favor of the government," but purported to focus on the "ordinary rules of statutory construction."[19] Of course, the ordinary rules of statutory construction require applying the plain meaning of statutory terms, which is commonly determined through dictionary definitions.[20] Here, the court offered only a brief statement that "cooperative housing corporation" has no plain meaning,[21] without attempting to consult dictionary definitions, and without determining whether the term has acquired a legal meaning.[22] Instead, the court of appeals applied the *in pari materia* doctrine, looked to the MITA's use of the term "homestead," and affirmed the denial of any exemption. In this respect, the court's decision accords more with the principle of narrowly construing tax exemptions than it does with the practice of applying plain statutory language.

More importantly, the Michigan Legislature changed the "homestead exemption" subsequent to the court of appeals decision. In a package of bills signed into law in summer 2003, the "homestead exemption" in the GPTA was renamed the "principal residence exemption."[23] Apparently,

---

16. MICH. COMP. LAWS ANN. § 206.2(2) (West 2002) (stating that "[a]ny term used in this act shall have the same meaning as when used in comparable context in the laws of the United States relating to federal income taxes unless a different meaning is clearly required").

17. *See* Rev. Rul. 74-241, 1974-1 C.B. 68.

18. *Inter Coop. Council*, 257 Mich. App. at 229, 668 N.W.2d at 187.

19. *Id.* at 223, 668 N.W.2d at 183-84.

20. *See, e.g.*, Title Office, Inc. v. Van Buren County Treas., 469 Mich. 516, 676 N.W.2d 207, 211 (2004).

21. *Inter Coop. Council*, 257 Mich. App. at 223, 668 N.W.2d at 184.

22. *See id.* at 229, 668 N.W.2d at 187.

23. *See* 2003 Mich. Pub. Acts 140 (amending the GPTA). The legislature made corresponding changes in other statutes that refer to the exemption, including: the Revised School Code, MICH. COMP. LAWS ANN § 380.1211, .1211e (West 2005); the Neighborhood

some taxpayers had been confusing the "homestead exemption" in the GPTA with the "homestead credit" in the MITA, prompting requests from municipal treasurers for a legislative change.[24] As a result of this legislation, the GPTA provision is now known as the "principal residence" exemption.[25]

This change calls into doubt the continuing viability of the court of appeals' decision in *Inter Cooperative Council*. Since the "homestead" exemption was renamed the "principal residence" exemption, the court of appeals' basis for reading the GPTA *in pari materia* with the MITA to define "cooperative housing corporation" is no longer present. Thus, attempts to define "cooperative housing corporation" should focus on that term's plain meaning, which may be understood based on dictionary definitions. Alternatively, the term may have acquired a "peculiar" meaning in the law that statutorily would have to be applied to understand the term.[26] Either of these approaches may result in broader availability of the new "principal residence" exemption than was allowed in *Inter Cooperative Council*. Regardless, in light of the legislative change, the reasoning from *Inter Cooperative Council* may no longer be valid, and the tax tribunal and the courts may have to revisit this issue.

The "principal residence" exemption also experienced other legislative changes during the *Survey* period. One of the changes appears to have been aimed at overturning the court of appeals' decision in *Stege v. Department of Treasury*.[27] In that case, a married couple claimed a homestead exemption from property taxes for their house in Michigan. The wife lived at the Michigan house most of the time, but the husband lived in Illinois. Further, the couple had filed a nonresident income tax return in Michigan, claiming that they were residents of Illinois. On the Illinois income tax return that they had filed as residents of that state, they claimed a tax

---

Enterprise Zone Act, MICH. COMP. LAWS ANN § 207.779 (West 2005); the Real Estate Transfer Tax Act, MICH. COMP. LAWS ANN § 207.526 ;(West 2005) the Development of Blighting Property Act, MICH. COMP. LAWS ANN § 125.2802 (West 2005); the Seller Disclosure Act, MICH. COMP. LAWS ANN § 565.957 (West 2005) ; the Tax Tribunal Act, MICH. COMP. LAWS ANN §§ 205.735, .737, . 743, and .762a (West 2005); and the School Aid Act, MICH. COMP. LAWS ANN § 388.1620 (West 2005).

24. *See* SENATE FISCAL AGENCY, SECOND ANALYSIS OF S.B. 129(S-2)-136(S-1) (Mar. 19, 2003).

25. *See* 71 SENATE J. 1579-80 (2003).

26. *See* MICH. COMP. LAWS ANN. § 3.8a (West 2002).

27. 252 Mich. App. 183, 651 N.W.2d 164 (2002).

credit for the property taxes that they had paid on their Illinois home.[28] Both the Department of Treasury and the tax tribunal denied their claim for a homestead exemption, but the court of appeals reversed. It reasoned that the former homestead exemption only applied to property in Michigan. The court of appeals also reasoned that the Illinois income tax credit was distinct. Therefore, since Michigan and Illinois do not have a reciprocal tax agreement, the Tax Tribunal could not interpret Illinois law to disfavor Michigan taxpayers.[29]

Subsequently, the Michigan Legislature prohibited a person that claims an exemption, deduction, or credit that is substantially similar to the Michigan principal residence exemption from obtaining the Michigan exemption. Likewise, a person cannot obtain a principal residence exemption if the person's spouse claims a substantially similar exemption, deduction, or credit in another state, unless the couple files separate income tax returns. In fact, any person that has filed an income tax return in another state as a resident of that state, excluding active-duty military personnel, is prohibited from obtaining a principal residence exemption under the 2003 amendments to the GPTA.[30]

Other changes in the "principal residence" exemption include a new audit provision to ensure that the exemption is not obtained in violation of Michigan law,[31] a related allowance for assessors to retrospectively revoke the exemption and collect unpaid taxes, including interest, and an extension of the deadline for taxpayers to file an affidavit claiming the exemption from December 31 to May 1.[32]

B. Tax Foreclosure

In the seventy-one consolidated tax foreclosure actions considered in

---

28. *Id.* at 186-87, 651 N.W.2d at 166.

29. *See id.* at 190-91, 651 N.W.2d at 168.

30. *See* 2003 Mich. Pub. Acts 105 (amending MICH. COMP. LAWS ANN. § 211.7cc).

31. *See* 2003 Mich. Pub. Acts 105 (amending MICH. COMP. LAWS ANN. § 211.7cc). A related amendment to the Revenue Act enables the Department of Treasury to share information with local assessors so that assessors can more effectively audit homestead exemption claims. *See* 2003 Mich. Pub. Acts 114 (amending MICH. COMP. LAWS ANN. § 205.28).

32. *See* 2003 Mich. Pub. Acts 247 (amending MICH. COMP. LAWS ANN. §§ 211.7cc, .7ee, .24c, and .154).

City of Detroit v. 19675 Hasse,[33] the court of appeals held that no limitations period applies to *in rem* actions to foreclose tax liens.[34] In the instant case, the City's complaints requested that the trial court enter a foreclosure judgment vesting title to the respective properties in the City. The complaints also requested awards of interest, penalties, and costs, as provided in the Detroit City Code.[35] Acorn Investment Company, which owned a number of the properties involved, moved to dismiss the complaint. It, argued that the City's actions for unpaid taxes that had become due more than six years before the City filed its complaints were time barred.[36] The trial court disagreed, holding that the legislature had not created a statute of limitations for *in rem* tax foreclosures, so no limitations period applied. Afterward, the trial court granted the City its requested relief, including interest, penalties, and costs.[37]

Acorn appealed, but the court of appeals affirmed the trial court's decision.[38] The basis for this decision was the "sovereign shield" doctrine, which provides that "periods of limitations do not operate against the state in the absence of a statute otherwise expressly so providing."[39] After reciting the doctrine, the court determined that no Michigan statute "pierces" the state's shield against limitations periods on *in rem* tax foreclosure actions. Acorn argued that a section of the Revised Judicature Act,[40] imposing a six-year limitations period against personal actions on the

---

33. 258 Mich. App. 438, 671 N.W.2d 150 (2003).

34. *Id.* at 452, 671 N.W.2d at 163-64.

35. *Id.* at 440, 671 N.W.2d at 157. Initially, some of the City's complaints also requested "that the trial court impose on the owners of the involved properties personal liability for the delinquent real property taxes," as provided in MICH. COMP. LAWS ANN. § 211.47 and 1997 Detroit Charter § 8-403. *See 19675 Hasse*, 258 Mich. App. at 440, 671 N.W.2d at 157. Subsequently, however, the City voluntarily withdrew the second count from these complaints. *Id.* at 448 n.16, 671 N.W.2d at 162 n.16.

36. *See 19675 Hasse*, 258 Mich. App. at 441, 671 N.W.2d at 158.

37. *Id.* at 442-44, 671 N.W.2d at 158-59. Acorn redeemed title to its properties by paying the past-due taxes and penalties before title irrevocably vested in the City. *See id.* at 444, 671 N.W.2d at 159.

38. *Id.* at 452, 671 N.W.2d at 163-64.

39. *Id.* at 445, 671 N.W.2d at 160. The court acknowledged the doctrine's origins in the royal prerogative, but, quoting the United States Supreme Court, explained that the doctrine's modern footing is in the "public policy of preserving the public rights . . . from injury and loss, by the negligence of public officers." *Id.* (quoting Guaranty Trust Co. of New York v. United States, 304 U.S. 126, 132-33 (1938)).

40. The provision in the Revised Judicature Act that Acorn cited is MICH. COMP.

state and its political subdivisions, applied because the foreclosure actions were essentially personal actions.[41] The court of appeals rejected that argument, turning to several general authorities that clarified that an action *in rem* is an action "directed against the thing or property itself, the object of which is to subject it directly to the power of the state, to establish the status or condition thereof, or to determine its disposition, and procure a judgment which shall be binding and conclusive against the world."[42] It held that because the City named the parcels themselves as defendants, its actions were *in rem*, and no limitations period applied.[43] Also, the court rejected Acorn's argument that because real estate taxes are the taxpayer's personal obligation, any action premised on tax debt must be a personal action. It stated that provisions permitting personal actions for tax debt provide a remedy in addition to *in rem* remedies.[44] Therefore, the court affirmed the trial court's decision, including the award of penalties, interest, and costs, which were authorized by the Detroit City Code.[45]

C. Tax-Reverted Properties

While the decision in *City of Detroit v. 19675 Hasse* may aid Michigan municipalities in foreclosing on properties with unpaid taxes, the presence of tax-reverted property itself presents serious problems for municipalities.[46] In some municipalities, the number of tax-reverted properties has grown alarmingly high; for example, the City of Detroit holds title to over 50,000 parcels that it obtained through tax reversion. Cities like Detroit have been unable to convey these properties because title to most of the properties is not clear, making buyers reluctant to become involved

---

LAWS ANN. § 600.5821(3) (West 2002).

41. *See 19675 Hasse,* 258 Mich. App. at 447, 671 N.W.2d at 161.

42. *Id.* at 448, 671 N.W.2d at 161-62 (internal quotations omitted).

43. *Id.*

44. *Id.* at 451, 671 N.W.2d at 163. Likewise, the court rejected Acorn's contention that a party may not seek an equitable remedy to avoid a time bar against an analogous legal remedy because Acorn offered no authority for the argument, and the court found no such authority. *See id.*

45. *See id.* at 454-55, 671 N.W.2d at 165.

46. "Tax reverted properties often contribute to urban decay by discouraging residential or commercial ownership, depressing property values, attracting criminal activity, and creating public health hazards." Press Release, Office of the Governor, Governor Granholm Signs Bills to Aid Urban Revitalization (Jan. 5, 2004).

with the properties. As a result, the properties remain in governmental hands, and cannot be rehabilitated and placed back into productive use on the tax rolls.[47]

During the *Survey* period, Michigan adopted several new acts that address the problems that tax-reverted properties can create. First, new legislation established the Land Bank Fast Track Authority, which is a state agency that can enter into agreements with local governmental bodies to acquire property, especially tax-reverted property, and clear title to the property.[48] Also, the legislation authorizes certain municipalities to establish their own fast-track authorities.[49] The authorities may clear title to their properties by bringing expedited quiet title actions, which would collect all the petitioning authorities' properties into a single quiet-title action.[50] Fast-track authorities are provided numerous other powers, including the power to dispose of their properties.[51]

One of the new acts exempts any property sold by a fast track authority from the general property tax for five years.[52] Instead of being taxed under the GPTA, such property authority is taxed under new legislation entitled the "Tax Reverted Clean Title Act."[53] The tax imposed by this Act is called the "eligible tax reverted property specific tax," which is equal to the amount of tax that would have been due had the GPTA applied to the property.[54] Also, this tax would be annual, and payable at the same time, in the same installments, and to the same officers, as the general property

---

47. *See* HOUSE LEGISLATIVE ANALYSIS SECTION, FIRST ANALYSIS OF H.B. 4480, 4481, 4482, 4483, 4484, 4488 (July 1, 2003).

48. *See* 2003 Mich. Pub. Acts 258 (to be codified at MICH. COMP. LAWS ANN. §§ 211.971-.976). The act also repealed the Tax-Reverted Property Emergency Disposal Act, formerly MICH. COMP. LAWS ANN. §§ 211.971-.976.

49. *See* 2003 Mich. Pub. Acts 258, § 9.

50. *Id.*

51. *Id.* at § 7. Other legislation allows the Authority to place its property into an established brownfield plan, *see* 2003 Mich. Pub. Acts 259 (amending MICH. COMP. LAWS ANN. §§ 125.2652, .2663), and provides for investment of funds into clearing title to property held by Redevelopment Fast Track Authorities. *See* 2003 Mich. Pub. Acts 262 (amending MICH. COMP. LAWS ANN. § 21.144 and creating § 21.2f).

52. *See* 2003 Mich. Pub. Acts 261 (creating MICH. COMP. LAWS ANN. §211.7gg). The exemption would not apply to certain property included in a brownfield plan. *Id.*

53. *See* 2003 Mich. Pub. Acts 260 (creating MICH. COMP. LAWS ANN. §§ 211.1021-.1026).

54. *Id.* § 5.

tax.[55]

Related legislation also amended the GPTA to revise the notice requirements that must be provided to owners of tax-delinquent property.[56] It sets forth specific notice provisions that apply to individuals, and that apply to various forms of corporate entities, as well as the records that municipalities must search to discover ownership interests.[57] The new legislation lifts the requirement for a strict title search, however, allowing the municipality to obtain a "title search product to identify the owners of a property interest" that must be notified.[58] But a municipality's failure to provide notice in accord with the new legislation is excused, so long as notice was provided in accord with constitutional minimums.[59] Indeed, the amendments state that its provisions for providing notice of show cause and foreclosure hearings are "exclusive and exhaustive," and that other notice requirements "are not applicable to notice and proof of service under" them.[60] Additional amendments include the following: changing the date for circuit courts to enter foreclosure judgments,[61] providing means for cancellation of foreclosure,[62] limiting damages that can be recovered for wrongful foreclosure,[63] changing the requirements and dates for tax sales,[64] and canceling certain charges for properties that are sold or transferred, or retained by a foreclosing government.[65] The amendments also provide that if the state forecloses on a property and retains possession, then title to that

---

55. *Id.* If the tax-reverted property is a principal residence, then an exemption applies just as it would under the GPTA.

56. *See* 2003 Mich. Pub. Acts 263 (amending numerous sections of the GPTA).

57. *Id.* at § 78i.

58. *Id.* at § 78i(1).

59. *Id.* at § 78i(10). Further, the amendments provide that a person is deemed to have received notice if the municipality followed the requirements of mailing, posting, and publishing the notice, or if the person had actual or constructive notice. *See id.* at § 78k. Notably, an enacting section of this new legislation stated that the legislation was not intended to alter the supreme court's decision in Smith v. Cliffs on the Bay Condominium Ass'n, 463 Mich. 420, 617 N.W.2d 536 (2000), which addressed the constitutional minimums for notice of a tax sale.

60. 2003 Mich. Pub. Acts 263, § 78i(12).

61. *See id.* at § 78k.

62. *See id.*

63. *See id.* at § 78*l*.

64. *See id.* at § 78m.

65. *See id.*

property automatically transfers to the state fast-track authority,[66] and contains provisions relating to tax-reverted property that qualifies as a "facility" under the Natural Resources and Environmental Protection Act.[67]

D. Taxes and Fees Under the Headlee Amendment

During the *Survey* period, the court of appeals addressed whether a municipal charge for connecting homes to water and sewer systems was a user fee or a tax that the Headlee Amendment requires to be approved by a majority of the voters that it will affect.[68] In *Mapleview Estates, Inc. v. Brown City*,[69] plaintiff, a manufactured housing developer, sued after the City raised the charges for plaintiff to connect new homes to the municipal water and sewer systems.[70] Plaintiff claimed that the charges were a disguised tax that required popular approval under the Headlee Amendment. The trial court agreed, leading the City to appeal.[71]

Applying the three-step analysis for distinguishing taxes from user fees set forth in the supreme court's decision in *Bolt v. City of Lansing*,[72] the court of appeals held that the City's tap-in charges were, in fact, user fees that did not require popular approval.[73] Under *Bolt*, a charge is a user fee if it serves a regulatory purpose rather than a revenue-raising purpose, it is proportionate to the necessary costs of the service, and it is voluntary, meaning that the payor could choose to not avail itself of the benefit and avoid the charge.[74] The court of appeals in *Mapleview Estates* observed that the charges for connecting a single site to the water and sewer systems were actually less than the costs of providing the services, so the charges were not means of raising revenue, and were not disproportionate to the cost of the service. It spent much more time, however, discussing the voluntary nature of the tap-in charge. The court stated that the definition of "user fee" from the Headlee Blue Ribbon Commission Report, which the

66. *See id.*

67. *See id.* at §§ 78m, 131. The new legislation also repealed MICH. COMP. LAWS ANN. § 211.78p.

68. *See* MICH. CONST. Art. 9, § 31.

69. 258 Mich. App. 412, 671 N.W.2d 572 (2003).

70. *Id.*

71. *Id.* at 413-14, 671 N.W.2d at 573-74.

72. 459 Mich. 152, 161-62, 587 N.W.2d 264, 269-70 (1998).

73. *See Mapleview Estates,* 258 Mich. App. at 417, 671 N.W.2d at 575.

74. *Id.* at 415, 671 N.W.2d at 574.

supreme court relied on in *Bolt*, "seems to describe exactly the situation in this case—those who want new homes in Brown City connected to the municipal water and sewer systems must pay tap-in fees, and the revenue generated by those fees is used for maintenance and operation of those systems."[75] Further, the court reasoned that the charge was voluntary because payors have "the ability to choose whether to use the service at all," and to "choose how much water and sewer they wish to use."[76] The court of appeals therefore reversed the trial court's decision.[77]

Mapleview Estates represents the first published opinion applying the three-step analysis for distinguishing taxes from user fees since *Bolt* was decided. While the analysis from *Bolt* has been criticized on several fronts,[78] including its use of the "voluntariness" factor,[79] the analysis nevertheless lent itself to a straightforward application to the facts in *Mapleview*.[80]

---

75. *Mapleview Estates*, 258 Mich. App. at 416, 671 N.W.2d at 575.

76. *Id.* at 417, 671 N.W.2d at 575.

77. *Id.* at 418, 671 N.W.2d at 576. The court of appeals also held that because the fees were actually less than the actual costs of connecting to the water and sewer systems, they were reasonable under Atlas Valley Golf & Country Club, Inc. v. Village of Goodrich, 227 Mich. App. 14, 24, 575 N.W.2d 56, 61 (1997). *Id.*

78. *See, e.g.*, David G. Pettinari, Comment, *Michigan's Latest Tax Limitation Battle: A Tale of Environmental Regulation, Capital Infrastructure and the "Will of the People,"* 77 U. DET. MERCY L. REV. 83, 150 (1999) (stating that *Bolt* "represents a departure from over 100 years of Michigan common law"); *see also* Cynthia B. Faulhaber, *"No New Taxes:" Article 9, Section 31 of the Michigan Constitution Twenty Years After Adoption,* 46 WAYNE L. REV. 211, 253 (2000) (stating that *Bolt* "ignored accepted rules applicable to determining the constitutionality of local legislation").

79. *See Bolt,* 459 Mich. at 180-81, 587 N.W.2d at 278 (Boyle, J., dissenting) (stating that "our precedent does not establish that voluntariness somehow constitutes a determinative factor in considering a fee to be a tax"). Notably, general authorities describing the distinctions between taxes and user fees do not include voluntariness as a factor. *See, e.g.*, 71 AM.JUR. 2D *State and Local Taxation* § 13 (2001).

80. 258 Mich. App. 412, 671 N.W.2d 572. One other case decided during the *Survey* period mentioned *Bolt,* but the court of appeals there discussed the difference between a special assessment and a tax. The court stated that *Bolt* had "little bearing to the critical question" in that case. Niles Twp. v. Berrien County Bd. of Comm'rs, 261 Mich. App. 308, 327, 683 N.W.2d 148, 158 (2004).

E. Personal Property

In addition to applying to real property, Michigan's property tax also applies to personal property.[81] The *Survey* period included the court of appeals upholding new multiplier tables used in assessing utility personal property, as well as changes to legislation governing other personal property.

1. Utility Property Multiplier Tables

Michigan's property tax specifically applies to utilities' "mains, pipes, supports, and wires,"[82] which were the subject of the court of appeals lengthy opinion in *Wayne County v. State Tax Commission*.[83] In that case, several municipalities located in southeastern Michigan challenged the validity of multiplier tables that the State Tax Commission (STC) had developed during the late 1990s for valuing utilities' transmission and distribution property.[84]

Personal property multiplier tables are "mass appraisal tools" that local assessors are required to apply in valuing property, and are used by taking the original installed cost of an item and applying a multiplier to convert the original cost to a present value.[85] Such tables had been used to value utilities' personal property since the 1960s, but in light of the tables' age and uncertain origins, the STC began studying the tables in the late 1990s. Ultimately, new tables were adopted in 1999, and lowered the values of utility transmission and delivery property. Consequently, municipal taxing units received less property tax revenue under the new tables.[86]

After briefing on the appropriate standard of review, the tax tribunal determined that the STC was the "final agency" for preparing the tables, so the tables would be presumed correct.[87] The tax tribunal concluded that the STC's adoption of the new tables would be approved if it was not

---

81. *See* MICH. COMP. LAWS ANN. § 211.8 (West 2002).

82. MICH. COMP. LAWS ANN. § 211.8(*g*) (West 2002).

83. 261 Mich. App. 174, 682 N.W.2d 100 (2004).

84. *See id.* at 176-77, 682 N.W.2d at 104-05.

85. *Id.* Local assessors are required to use the *Assessor's Manual* by MICH. COMP. LAWS ANN. § 211.10e (West 2002).

86. *See Wayne County*, 261 Mich. App. at 180-85, 682 N.W.2d at 106-08.

87. *Id.* at 187, 682 N.W.2d at 110.

fraudulent, legally erroneous, or premised on a wrong principle, as provided in article 6, section 28 of the Michigan Constitution. After a hearing that spanned two years, the tribunal approved the adoption of the new tables.[88]

In reviewing the tribunal's decision, the court of appeals first addressed the tribunal's presumption that the tables were correct. The court of appeals agreed that the STC is responsible for preparing the tables, but held that a provision of the Tax Tribunal Act makes clear that the tribunal, not the STC, is the final agency for the administration of property tax laws.[89] Thus, rather than presuming that the tables were correct, the tribunal was required to review them *de novo*.[90] Nevertheless, the court held that the tribunal never actually applied any presumption that the tables were correct, so the tribunal's error on this issue was not reversible.[91]

Continuing, the court determined that the only issue that could be appropriately addressed in this case was "whether the methods used by the STC are inherently in violation of Michigan law and could never be used in an assessment."[92] The court then discussed the municipalities' arguments, beginning with the argument that the multiplier tables violated Michigan law because the STC did not use a sales comparison approach in formulating them.[93] The court noted that under *Meadowlanes Limited Dividend Housing Association v. City of Holland*,[94] use of the sales comparison approach is not required, but must be considered and applied if doing so is

---

88. *Id.* at 185, 682 N.W.2d at 109.

89. *Id.* at 187, 682 N.W.2d at 110. The provision of the Tax Tribunal Act that the court cited is MICH. COMP. LAWS ANN. § 205.753(1) (West 2002).

90. *See Wayne County,* 261 Mich. App. at 189, 682 N.W.2d at 111. The Tax Tribunal Act provides that hearings before the tribunal are *de novo*, and places the burden of proof on the petitioner at such a hearing. *See* MICH. COMP. LAWS ANN. § 205.735, .737 (West 2002).

91. *See Wayne County*, 261 Mich. App. at 190-91, 682 N.W.2d at 112.

92. *Id.* at 198, 682 N.W.2d at 116.

93. *Id.* at 199, 682 N.W.2d at 116. The "sales comparison approach" is an appraisal method that estimates property value by comparing a subject property with other properties that have been involved in transactions. Comparisons are made for a number of characteristics, and the other properties' prices are adjusted to account for different characteristics to estimate the subject property's value. *See* Antisdale v. City of Galesburg, 420 Mich. 265, 276 n.1, 362 N.W.2d 632, 637 n.1 (1985). The "sales comparison approach" used to be called simply the "market approach." *See* J.D. EATON, REAL ESTATE VALUATION IN LITIGATION 197 (2d ed. 1995).

94. 437 Mich. 473, 484-86, 473 N.W.2d 636, 642-43 (1991).

"feasible and justifiable."[95] Reviewing the record of the tribunal proceedings, the court stated "there was no real attempt by the STC to calculate the numbers, qualify property, and make adjustments in order to reflect an honest attempt to use a market approach."[96] Despite that, the record demonstrated that it was self-evident that there were too many problems with the sales comparison approach, making an "extensive investigation by the STC unnecessary."[97] The court therefore agreed with the tribunal's decision that the STC had not erred in failing to consider the sales comparison approach. Moreover, the court questioned whether the principles requiring consideration of a sales comparison approach recited in the context of valuing a specific asset in *Meadowlanes* even applied to the development of mass appraisal tools, designed to apply to an entire category of property, because the necessary adjustments could not be computed across the entire category.[98]

The court also rejected the municipalities' argument that the STC's cost approach to formulating the tables violated Michigan law. Generally, the cost approach involves beginning with the cost to replace or reproduce an asset as if the asset were new, and then deducting an appropriate amount to account for the asset's depreciation to determine the asset's value.[99] The municipalities argued that rather than beginning with replacement or reproduction cost, the STC began with the net book value of the utilities' property, which is the "rate base" used by the Michigan Public Service Commission for determining the rates that utilities may charge for services. By doing so, the municipalities urged that the STC's tables violated both the GPTA and Michigan precedent. The court disagreed, concluding that the GPTA permits consideration of rate base so long as it is not "controlling," and that the prior cases were largely distinguishable, though the court did disavow any suggestion in *Consumers Power Co. v. Port Sheldon Township* that rate base could not be considered because such a suggestion

---

95. *Wayne County*, 261 Mich. App. at 200-01, 682 N.W.2d at 117-18.

96. *Id.* at 206, 682 N.W.2d at 120.

97. *Id.*

98. *Id.* at 207, 682 N.W.2d at 120. The court was careful to state that it was not "precluding a party from using a sales-comparison approach for valuing [transmission and delivery] property in any future individual assessment dispute regarding particular [transmission and delivery] property." *Id.* at 207, 682 N.W.2d at 120-21.

99. *See Meadowlanes*, 437 Mich. at 484 n.19, 473 N.W.2d at 642 n.19.

would conflict with the GPTA.[100] Again, though, the court limited its decision, stating that it was only deciding that the STC's method was not "inherently violative of Michigan law," and not whether the method "accurately produces a property's true cash value" in a specific case.[101]

The municipalities challenged the STC's adoption of the new tables on a number of other grounds as well, but the court of appeals concluded that none of the arguments required reversal. For example, the municipalities argued that the STC's income approach to value was invalid because it was based on a ratio derived by comparing the value of transmission and delivery property to the value of an entire utility plant, instead of using actual income derived from the property to develop an income projection formula.[102] Though acknowledging merit in the argument, the court nevertheless held that nothing in Michigan law prohibited the STC from using the plant-to-property ratio.[103] The municipalities also challenged the tables based on third-party contributions to the utilities' construction costs, errors in the data used to formulate the tables, and whether utility plants could be valued as functioning economic units, but the court found nothing in the arguments that required reversal.[104] Throughout its opinion, however, the court was careful to state that it was only addressing whether the STC's methods in developing the new multiplier tables inherently violated Michigan law.[105] It left open the possibility that the municipalities' arguments might

---

100. *See Wayne County*, 261 Mich. App. at 218, 682 N.W.2d at 126. Specifically, the court disagreed with the municipalities' reading of MICH. COMP. LAWS ANN. § 211.27(1), and noted that Consumers Power Co. v. Big Prairie Township, 81 Mich. App. 120, 265 N.W.2d 182 (1978), was decided before the pertinent language was added to the GPTA. The court distinguished Consumers Power Co. v. Port Sheldon Township, 91 Mich. App. 180, 283 N.W.2d 680 (1979), but disavowed it to the extent that it "runs contrary to the clear language of subsection 27(1)" and the *Wayne County* decision. *Id.* at 220, 682 N.W.2d at 127.

101. *Wayne County*, 261 Mich. App. at 209, 682 N.W.2d at 122.

102. The income approach, otherwise known as the income capitalization approach, "measures the present value of the future benefits of property ownership by estimating the property's income stream and its resale value (reversionary interests) and then developing a capitalization rate which is used to convert the estimated future benefits into a present lump-sum value." *Meadowlanes*, 437 Mich. at 485 n.20, 473 N.W.2d at 642 n.20.

103. *Wayne County*, 261 Mich. App. at 227, 682 N.W.2d at 131. The court added that the record in the case suggested "that there is no realistic manner to determine income actually and specifically generated by [transmission and delivery] property" in any event. *Id.*

104. *Id.* at 229-244, 682 N.W.2d at 132-40.

105. *See, e.g., id.* at 240, 682 N.W.2d at 138.

have merit in the context of an individual assessment dispute even though they did not invalidate the tables themselves, which, the court stated, provide a starting point for individual assessments but may be varied in appropriate circumstances.[106]

2. The "Special Tools" Exemption

Another development concerning personal property involved the definition of "special tools," which are exempt from taxation.[107] Formerly, the GPTA had given the STC a role in defining the meaning of "special tools."[108] The STC had issued an administrative rule defining "special tools," but also included provisions in its *Assessors Manual* concerning that definition.[109]

Though the new definition of "special tool" is similar to the previous definition in many respects, and incorporates much of the STC's administrative rule and *Assessor's Manual* provisions, it no longer delegates responsibility for the definition to the STC. Rather, the GPTA now defines "special tool" itself:

> "Special tool" means a finished or unfinished device such as a die, jig, fixture, mold, pattern, special gauge, or similar device, that is used, or is being prepared for use, to manufacture a product and that cannot be used to manufacture another product without substantial modification of the device. The length of the economic life of the product manufactured shall not be considered in making a determination whether a device used to manufacture that product is a special tool.[110]

A "product" can be a special tool, but a "device that differs in character from dies, jigs, fixtures, molds, patterns, or special gauges" cannot be a

---

106. *Id.* at 245-246, 682 N.W.2d at 141.

107. *See* MICH. COMP. LAWS ANN. § 211.9b (West 2004).

108. *Id.*, *amended by* 2003 Mich. Pub. Acts 274 and 2004 Mich. Pub. Acts 4.

109. *See* MICH. ADMIN. CODE R. 209.21 (1999); *see also* STATE TAX COMMISSION, ASSESSORS MANUAL 15-6 (2004).

110. 2004 Mich. Pub. Acts 4 (amending MICH. COMP. LAWS ANN. § 211.9b). The Michigan Legislature first amended GPTA § 9b in 2003 Mich. Pub. Acts 274, but refined the changes to § 9b in 2004 Mich. Pub. Acts 4.

special tool, just as machinery and equipment cannot be special tools.[111]

The amendment also provides that a taxpayer's personal property statement may include a separate entry for "the aggregate total of the original cost of excluded exempt special tools."[112] In conjunction with the change to the definition of "special tools," the legislature also amended the GPTA to provide that for purposes of a personal property statement, the true cash value of a "die, jig, fixture, mold, pattern, gauge, or other tool that is not a special tool," is that device's net book value.[113]

These changes to the GPTA's provisions governing "special tools" come on the heels of the supreme court's decision in *Danse Corp. v. City of Madison Heights*.[114] There, the court reversed the tax tribunal's decision that a device was not a special tool because it did not satisfy all the "guidelines" in the *Assessor's Manual*.[115] The court held that even though the STC had statutory authority to define "special tools," it could only do so by complying with the Administrative Procedures Act.[116] Because the *Assessor's Manual* was not promulgated under the APA, it was only explanatory, and did not have the force of law.[117] Thus, only the statute and the administrative rule were determinative in defining "special tools."[118] Nothing in the amendments concerning "special tools" mentions the *Danse Corp.* decision by name, but certain legislative materials reference "recent court decisions."[119] Indeed, the amendments can be viewed as the legislature's effort to settle the definition of "special tool" and avoid further disputes over the breadth of the special tools exemption.

---

111. 2004 Mich. Pub. Acts 4 (amending MICH. COMP. LAWS ANN. § 211.9b).

112. 2004 Mich. Pub. Acts 4 (amending MICH. COMP. LAWS ANN. § 211.9b).

113. *See* 2003 Mich. Pub. Acts 274 (amending MICH. COMP. LAWS ANN. § 211.27). Notably, however, the new subsection clarifies that the "net book value of [such a device, defined as a] standard tool for federal income tax purposes is not the presumptive true cash value of that standard tool." *Id.* Personal property statements are generally governed by MICH. COMP. LAWS ANN. § 211.19.

114. 466 Mich. 175, 644 N.W.2d 721 (2003).

115. *Id.* at 179-83, 644 N.W.2d at 724-26.

116. *Id.* at 179, 644 N.W.2d at 724.

117. *Id.* at 181, 644 N.W.2d at 725.

118. *Id.* at 179-83, 644 N.W.2d at 724-26.

119. *See* SENATE FISCAL AGENCY, S.B. 811 (S-4) FLOOR ANALYSIS 2 (Dec. 11, 2003).

3. Other Personal Property Exemptions

The Michigan Legislature addressed another personal property tax exemption when it permitted an exemption for property owned by an "eligible pharmaceutical company" by amending both the GPTA and the Michigan Economic Growth Authority Act (MEGAA). Under the GPTA, eligible municipalities may exempt from taxation new personal property obtained by certain businesses.[120] During the *Survey* period, the legislature broadened the range of businesses that may be granted the exemption by incorporating into the GPTA certain businesses encompassed by the MEGAA.[121] In turn, the MEGAA was amended to include an "eligible pharmaceutical company."[122] This amendment was part of the effort to convince pharmaceutical companies with operations in Michigan not to relocate.[123]

F. Boards of Review

Finally, the dates that boards of review may begin hearing assessment appeals were changed during the *Survey* period. A property owner that wishes to contest the assessment placed on its property must initially appear at the local board of review to contest the assessment.[124] Previously, boards of review across the state were required to meet on the same day in March to hear assessment appeals. This was problematic for some assessors, who serve multiple communities.[125] The legislature addressed that problem by amending the GPTA to provide that municipalities may authorize "alternative starting dates in March when the board of review shall initially

120. *See* MICH. COMP. LAWS ANN. § 211.9f (West 2004).

121. *See* 2004 Mich. Pub. Acts 79 (amending MICH. COMP. LAWS ANN. § 211.9f).

122. 2004 Mich. Pub. Acts 81 (amending MICH. COMP. LAWS ANN. § 207.808). An eligible pharmaceutical company must be engaged primarily in the manufacture, research and development, and sale of pharmaceuticals, have at least 8,500 employees in Michigan, all of whom must be within 100 miles of each other or the municipality offering the exemption, and 5,000 of the employees must be engaged primarily in researching and developing pharmaceuticals. *See id.*

123. *See* HOUSE LEGISLATIVE ANALYSIS SECTION, H.B. 4454 & 4472: FIRST ANALYSIS (Aug. 11, 2003).

124. *See* MICH. COMP. LAWS ANN. § 205.735(1) (West 2004).

125. *See* HOUSE LEGISLATIVE ANALYSIS SECTION, FIRST ANALYSIS OF H.B. 4211 (Apr. 3, 2003).

meet," and provide several possible alternative starting dates.[126]

III. INCOME TAX

The *Survey* period included a number of developments in Michigan income tax law, all of which arrived in the form of legislation. Changes included new requirements for flow-through entities, a revised definition of "business income," and changes in the income that is subject to taxation.

A. Tax Withholding by Flow-Through Entities

A package of bills that became effective in October 2003 required that "flow-through entities" must withhold Michigan income tax on behalf of their non-resident members, just as employers must withhold income tax on behalf of employees.[127] Notably, the amount that flow-through entities must withhold is based on "income available for distribution" rather than actual distributions.[128] A "flow-through entity" can be "an S corporation, partnership, limited partnership, limited liability partnership, or limited liability company," and "non-resident members" include any shareholder, partner, or member, as appropriate, that is either not domiciled in Michigan, is a non-resident estate or trust, or is another flow-through entity with a nonresident

126. 2003 Mich. Pub. Acts 194 (amending MICH. COMP. LAWS ANN. § 211.30).

127. 2003 Mich. Pub. Acts 22 (amending MICH. COMP. LAWS ANN. § 206.351). Also, the new legislation requires flow-through entities to provide withholding reports and forms in the same manner as other employers, and requires non-resident members to provide the necessary information for the entity to accurately determine the amount to withhold. *See* 2003 Mich. Pub. Acts 47 (amending MICH. COMP. LAWS ANN. § 206.365). The general administration, collection, and enforcement provisions of the MITA were extended to flow-through entities by 2003 Mich. Pub. Acts 48 (amending MICH. COMP. LAWS ANN. §206.355). Other changes include adding flow-through entities to the definition of "taxpayer," *see* 2003 Mich. Pub. Acts 50 (amending MICH. COMP. LAWS ANN. § 206.26), adding the amounts that flow-through entities must withhold to the MITA's definition of "tax," *see* 2003 Mich. Pub. Acts 51 (amending MICH. COMP. LAWS ANN. § 206.22), and extending the MITA's dissolution requirement to any "other business entity" in addition to foreign and domestic corporations. *See* 2003 Mich. Pub. Acts 46 (amending MICH. COMP. LAWS ANN. § 206.451). While not dealing specifically with flow-through entities, Act 46 was tie barred to the flow-through entity legislation. For a thorough discussion of the flow-through entity legislation, see Paul V. McCord, *Fear and Loathing in Michigan's Flow-Through Entity Withholding Tax,* 31 MICH. REAL PROP. REV. 9 (2004).

128. 2003 Mich. Pub. Acts 22 (amending MICH. COMP. LAWS ANN. § 206.351).

member.[129] The new MITA provisions permit a non-resident member with income from a flow-through entity to choose to be included in the flow-through entity's composite income tax return. A non-resident member that does so could claim a credit on its individual tax return for the amount of taxes paid by the flow-through entity for that individual.[130]

This new legislation was part of a program to increase the state's revenue by closing certain perceived "loopholes" in Michigan tax law, and brings Michigan into a group of nearly thirty states that "impose a withholding tax on specific transactions with nonresidents."[131] Despite the Michigan Department of Treasury issuing an administrative bulletin that addressed many issues raised by the new legislation,[132] others remain, including whether certain deduction or loss items in one classification can be used to offset income in determining the amounts to withhold.[133] Also, because the new provisions are based on "income available for distribution" rather than actual distributions, they may require flow-through entities to re-evaluate their financial arrangements, and may even cause some entities to violate their governing documents.[134] The new MITA provisions "impose additional tax payment and reporting requirements" for flow-through entities, and until further legislative, administrative, or judicial guidance is available, these provisions "only add to the existing complexity of Michigan's tax laws."[135]

B. Business Income

In another move designed to close a perceived "tax loophole," the Michigan Legislature adopted a new definition of "business income."

---

129. 2003 Mich Pub. Acts 45 (amending MICH. COMP. LAWS ANN. § 206.12).

130. *See* 2003 Mich. Pub. Acts 49 (amending MICH. COMP. LAWS ANN. § 206.315).

131. McCord, *supra* note 127, at 9-10.

132. Subsequent to the new legislation becoming effective, the Michigan Department of Treasury issued an administrative bulletin addressing matters including compliance requirements, calculating a member's share of taxable income, issues arising with flow-through entities that have other flow-through entities as members, coordinating returns when members elect to be included in the entity's composite return, and minimum thresholds for the withholding requirements to apply at all. *See* Michigan Dep't of Treas., Revenue Admin. Bulletin 2003-4.

133. *See* McCord, *supra* note 127, at 12-13.

134. *See id.* at 13.

135. *Id.*

Previously, "business income" was defined as "income arising from transactions, activities and sources in the regular course of the taxpayer's trade or business," including "income from tangible and intangible property if the acquisition, rental, management and disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations."[136] In an apparent attempt to prevent taxpayers from avoiding taxation by mischaracterizing business income, the legislature amended the definition to include isolated sales and sales of businesses themselves:

> "Business income" means all income arising from transactions, activities, and sources in the regular course of the taxpayer's trade or business and includes the following:
> (a) All income from tangible and intangible property if the acquisition, rental, management, or disposition of the property constitutes integral parts of the taxpayer's regular trade or business operations.
> (b) Gains or losses from stock and securities of any foreign or domestic corporation and dividend and interest income.
> (c) Income derived from isolated sales, leases, assignment, licenses, divisions, or other infrequently occurring dispositions, transfers, or transactions involving property if the property is or was used in the taxpayer's trade or business operation.
> (d) Income derived from the sale of a business.[137]

The change may not be long-lived, though, as the amendment itself requires the treasury department to report the new definition's impact on taxpayers' liability to the legislature two years after the date that the amendment was adopted.[138]

C. Other Changes in the Michigan Income Tax Act

A few other notable changes were adopted to the MITA during the *Survey* period. First, the legislature amended the definition of "property taxes" for years before 2003,[139] and adopted a new definition for years

136. MICH. COMP. LAWS ANN. § 206.4 (West 2004) (historical and statutory notes).
137. 2003 Mich. Pub. Acts 52 (amending MICH. COMP. LAWS ANN. § 206.4).
138. *See id.*
139. *See* 2003 Mich. Pub. Acts 29 (amending MICH. COMP. LAWS ANN. § 206.512).

beginning with 2003,[140] to ensure that township residents are not unfairly denied a property tax credit against their income tax liability. Many townships include villages, and residents of the villages are also residents of the townships. If a township levies a special assessment for public safety services, for example, it may exclude the village from the assessment if the village provides its own public safety services. That prevents double taxation on village residents, but, under the prior definition of "property taxes" in the MITA, it also prevented township residents from including the special assessments in the amounts used to determine their property tax credits because the assessments were not levied across the entire township. The new definitions clarify that a township special assessment "for police, fire, or advanced life support" may exclude a village and nevertheless be used to determine the homestead property tax credit.[141]

Other changes include a new requirement that any person that must file a 1099-MISC form under the federal internal revenue code must also file the form with the Michigan Department of Treasury,[142] the inclusion of non-residents' winnings from Michigan casinos and race tracks in taxable income allocated to Michigan,[143] and adoption of a credit against the income tax for certain taxpayers that have remaining single business tax credit after the single business tax expires.[144]

IV. THE SINGLE BUSINESS TAX

The single business tax is Michigan's "value added" tax, which measures the "increase in value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale."[145] It is intended to "impose a tax upon the privilege of

---

140. *See* 2003 Mich. Pub. Acts 28 (adopting MICH. COMP. LAWS ANN. § 206.512a).

141. *Id.*

142. *See* 2003 Mich. Pub. Acts 211 (adopting MICH. COMP. LAWS ANN. § 206.355a).

143. *See* 2003 Mich. Pub. Acts 21 (amending MICH. COMP. LAWS ANN. § 206.110).

144. *See* 2003 Mich. Pub. Acts 295 (adopting MICH. COMP. LAWS ANN. § 206.270). This act was adopted in association with new legislation creating the Michigan Early Stage Capital Investment Corporation, a charitable body designed to promote investment in high-technology business, which could offer the income tax credit to certain investors. *See* 2003 Mich. Pub. Acts 296.

145. *See* Cowen v. Dep't of Treas., 204 Mich. App. 428, 432, 516 N.W.2d 511, 513 (1994).

conducting business activity within the state,"[146] and is currently set to expire in 2009.[147] During the *Survey* period, the Michigan courts addressed successor liability in the context of the single business tax, and the legislature adopted changes in the basis against which the tax is levied, as well as new credits against the tax.

A. Successor Liability

The Michigan Revenue Act, which provides the Department of Treasury the power to enforce Michigan tax laws, including the single business tax,[148] provides that if a business is sold or discontinued, then the business owner must "make a final return within 15 days after the date of selling or quitting the business."[149] It further provides that if the business is transferred, the successor "shall escrow sufficient money to cover the amount of taxes, interest, and penalties as may be due" until the former owner can produce a tax receipt showing that the taxes are paid or are not due.[150] If the successor fails to escrow the money, it becomes "personally liable for the payment" of the amounts that the former owner owed.[151]

In *S.T.C., Inc. v. Department of Treasury*,[152] the purchaser of a business challenged the imposition of successor liability for single business taxes due.[153] The purchaser had examined the business' books and determined that as of the purchase date, the business was current in its quarterly estimated tax payments. Apparently, however, the estimated payments were insufficient because the seller subsequently filed a return indicating that over $12,000 in single business taxes were due.[154] However, the seller did not pay the taxes due, and had left the country. Thus, the Department of Treasury notified the purchaser that, as successor, it was

146. *Id.*

147. *See* MICH. COMP. LAWS ANN. § 208.39e (West 2004) (historical and statutory notes).

148. MICH. COMP. LAWS ANN. §§ 205.1, .13 (West 2004)

149. MICH. COMP. LAWS ANN. § 205.27a (West 2004).

150. MICH. COMP. LAWS ANN. § 205.27a. (West 2004).

151. *Id.*

152. 257 Mich. App. 528, 669 N.W.2d 594 (2003).

153. *Id.*

154. *Id.* at 530-31, 669 N.W.2d at 597. This is "apparent" because the court simply stated that the seller's return showed a balance owing, without explaining the reason for the shortfall.

personally liable for the taxes due.[155]

The purchaser argued that because no tax was "due and unpaid" when it examined the sellers' books, it could not be liable.[156] That argument did not persuade the court of appeals, which noted that the purchaser reviewed only the seller's estimated payments. The estimated payments did not necessarily cover taxes actually due, and the Revenue Act provides that deficiencies in estimated payments are "treated in the same manner as a tax due," subject to the same penalties and interest as unpaid taxes.[157] The information was sufficient for the court of appeals to affirm the tax tribunal's rejection of the purchaser's argument.[158]

Nevertheless, the court of appeals addressed the purchaser's argument that the statutory language "as may be due and unpaid" requires only payment of taxes due at the time of a purchase, and not those that become due and unpaid subsequent to the purchase. Applying a plain language approach, the court turned to dictionary definitions to discern the meaning of the statutory language, and held that those definitions indicated that "the phrase 'as may be due and paid' connotes both present and future,"[159] undermining the purchaser's interpretation. Also, the court rejected the purchaser's argument that the successor liability statute was unconstitutionally void for vagueness, reasoning that no evidence demonstrated that the purchaser could not comply with the successor liability statute "because of his inability to understand the phrase 'as may be due and unpaid.'"[160] The court therefore affirmed the tribunal's decision that the Department of Treasury had correctly imposed successor liability on the purchaser.[161]

Importantly, though successor liability was imposed for single business tax due in *S.T.C.*, the court's analysis of the Revenue Act applies equally to all other taxes administered under that Act. Moreover, during the *Survey* period, the successor liability provision in the Revenue Act was updated to

---

155. *Id.* at 531, 669 N.W.2d at 597.

156. *Id.* at 534, 669 N.W.2d at 599.

157. MICH. COMP. LAWS ANN. § 205.23(2).

158. *S.T.C.*, 257 Mich. App. at 535-36, 669 N.W.2d at 599.

159. *Id.* at 535, 669 N.W.2d at 599 (quoting MICH. COMP. LAWS ANN. § 205.27a). Also, note the contrast with the application of the plain language approach in *Inter Cooperative Council*. The application in that case did not reference dictionary definitions, while in *S.T.C.*, that was the court's first step.

160. *S.T.C.*, 257 Mich. App. at 539, 669 N.W.2d at 601.

161. *Id.* at 538-40, 669 N.W.2d at 601.

include entity forms that had never been inserted into the Act, including limited liability companies, limited liability partnerships, partnerships, and limited partnerships. The changes also extended personal liability for past due payments to those entities' officers, members, managers, and partners that the Department of Treasury "determines, based on either an audit or an investigation, have control or supervision of, or responsibility for, making the returns or payments."[162] Notably, in determining which officer, member, manager, or partner is responsible, any such person's signature on a return or negotiable instrument submitted to pay taxes "is prima facie evidence of [that person's] responsibility for making the returns and payments."[163] Between the decision concerning single business tax in *S.T.C.*, and the amendment to the Revenue Act, Michigan's successor liability provisions became more clear and more powerful during the *Survey* period.

B. New Credits Under the Single Business Tax Act

The legislature also adopted new provisions governing credits under the single business tax. Under the Single Business Tax Act, "compensation" paid to on or behalf of employees is part of an employers' tax base.[164] "Compensation" formerly included payments to health benefit plans. Two sections of the Act were amended to exclude portions of payments to health benefit plans from the definition of "compensation," with the amount excluded increasing to fifty percent over several years.[165] Another package of amendments extended the Michigan economic growth authority's power to grant single business tax credits,[166] while another amendment increased the credit available for apprentices trained by certain tool and die manufacturers.[167] All these amendments limit a tax that, of course, is set to

162. 2003 Mich. Pub. Acts 23 (amending MICH. COMP. LAWS ANN. § 205.27a).

163. *Id.*

164. MICH. COMP. LAWS ANN. § 208.4 (West 2003).

165. *See* 2003 Mich. Pub. Acts 240, 241 (amending MICH. COMP. LAWS ANN. §§ 208.4 and 208.4a, respectively).

166. *See* 2003 Mich. Pub. Acts 248 (amending several sections of the MEGAA, and adding MICH. COMP. LAWS ANN. § 208.8a); 2003 Mich. Pub. Acts 249, 250, 251 (amending MICH. COMP. LAWS ANN. §§ 208.38g, .37d, and .37c, respectively). Another amendment provided single business tax credits to businesses that invest with the Michigan Early Stage Venture Capital Corporation. *See* 2003 Mich. Pub. Acts 297 (amending MICH. COMP. LAWS ANN. § 208.37e).

167. *See* 2003 Mich. Pub. Acts 273 (amending MICH. COMP. LAWS ANN. § 208.38e).

expire after 2009.

V. SALES TAX

The sales tax has been described as a tax on "sellers for the privilege of engaging in the business of making retail sales of tangible personal property."[168] During the *Survey* period, the Michigan Supreme Court clarified that an "incidental to service" analysis applies to determine whether a transaction was a sale of goods, subject to the sales tax, or the provision of services. In *Catalina Marketing Sales Corp. v. Department of Treasury*,[169] Catalina contracted with manufacturers of certain goods for Catalina to provide a coupon or an advertising message, called a "Checkout Coupon," to consumers when the consumers purchased certain goods at grocery stores. The court used the example of a soup company, explaining that the company could contract with Catalina for grocery store customers to receive either a coupon or an advertising message when they purchased soup. Catalina would send consumers that purchased soup, for example, a coupon or advertisement for the next soup purchase or for a complementary product such as crackers, or send nothing. After a two-year audit, the Department of Treasury concluded that Catalina was selling goods and that the sales tax applied. Catalina challenged that conclusion in the tax tribunal, arguing that it was providing a service that was not subject to the sales tax. Relying on a Department of Treasury Revenue Administrative Bulletin, the tax tribunal applied a "real object" test that focused on whether Catalina's customers viewed the "real object" of the transaction as the sale of goods, and concluded that the transaction was a sale of goods that was subject to sales tax.[170]

However, the Michigan Supreme Court rejected the "real object" test in *Catalina*.[171] The court noted that the Revenue Administrative Bulletin did not have the force of law, and that the tax tribunal had ignored a published,

---

168. Catalina Marketing Sales Corp. v. Dep't of Treasury, 470 Mich. 13, 22, 678 N.W.2d 619, 625 (2004).

169. 470 Mich. 13, 678 N.W.2d 619.

170. *Catalina,* 470 Mich. at 20-21, 678 N.W.2d at 623-24; *see also* Department of Treasury, Revenue Admin. Bulletin 1995-1. The "real object" test had originated in Michigan in a 1986 tax tribunal decision. *See* Shelby Graphics, Inc. v. Dep't of Treasury, 5 M.T.T.R. 63 (1986).

171. *Catalina,* 470 Mich. at 23, 678 N.W.2d at 625.

and therefore precedential, court of appeals decision applying an "incidental to service" test for determining whether a transaction was a sale of goods or the provision of services.[172] The court stated that the tribunal reversibly erred in failing to follow that precedent, but nevertheless considered the merits of an "incidental to service" test because the supreme court was not bound by the court of appeals precedent.[173]

A "real object" test, the court held, is not consistent with the statutory definition of "sale at retail."[174] The Sales Tax Act does not give primary consideration to the purchaser's perspective, as the "real object" test does.[175] "Instead, the statute's perspective is more broadly focused and requires a fuller analysis that weighs not only the perspectives of the parties to the sale, but also the nature of the product and service."[176] Thus, in applying this test, courts must look "objectively at the entire transaction to determine whether the transaction is principally a transfer of tangible personal property or a provision of a service."[177] If the purchaser obtains both a service and tangible property, but "the transfer of the tangible property is only incidental to the service provided, then the transaction is not a sale at retail" under the Sales Tax Act.[178]

The *Catalina* decision definitively provides that when a sale of goods must be distinguished from the provision of services for purposes of sales tax liability, the "incidental to service" standard will apply. As the supreme court noted, this is the same analysis used under the Uniform Commercial Code for determining whether the Code, which applies only to the sale of goods, applies to a transaction.[179] Thus, while the "incidental to service" test was not entirely new, given that the court of appeals had adopted it in 1996,

---

172. *Id.* at 22-23, 678 N.W.2d at 624-25. The court of appeals decision was University of Michigan Bd. of Regents v. Dep't of Treasury, 217 Mich. App. 665, 553 N.W.2d 349 (1996).

173. *Catalina,* 470 Mich. at 23, 678 N.W.2d at 625.

174. *Id.* at 25, 678 N.W.2d at 626.

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* Notably, the factual holding in *Catalina* means little. The case arose in 1994, but the Sales Tax Act was amended in 1995, providing that a "commercial advertising element" is not a sale of goods. MICH. COMP. LAWS ANN. § 205.51(1)(*h*) (West 2003).

179. *Catalina*, 470 Mich. at 24 n.7, 678 N.W.2d at 626 n.7; *see also* Neibarger v. Universal Coops., Inc., 439 Mich. 512, 534, 486 N.W.2d 612, 621 (1992) (adopting an "incidental to service" test under the Michigan Uniform Commercial Code).

the supreme court's observation that the analysis under the Sales Tax Act is consistent with the analysis under the Uniform Commercial Code makes a much broader body of precedent available for determining whether sales tax is due on a mixed sale-service transaction.[180]

VI. USE TAX

The use tax is a complement to the sales tax, and applies to remote sales or to products purchased outside of Michigan that are brought into this state for storage, use, or consumption.[181] During the *Survey* period, a conflict panel of the Michigan Court of Appeals overturned an earlier case, and clarified the exemption from use tax for prescription drugs for human use. Likewise, the Michigan Legislature amended the use tax to supersede the court of appeals decision in another case, which had held that there is no time limit on use tax liability.

A. The Prescription Drug Exemption

In *Birchwood Manor, Inc. v. Commissioner of Revenue*,[182] a special panel of the court of appeals convened to resolve a conflict between the court's initial understanding of the term "prescription drug," and the understanding of that term applied in *CompuPharm-LTC v. Department of Treasury*.[183] Under the Use Tax Act, "prescription drugs for human use" are exempt from taxation.[184] That Act defines "prescription drug" as "a drug dispensed by a licensed pharmacist pursuant to a written prescription

---

180. *See* 2003 Mich. Pub. Acts 25 (amending MICH. COMP. LAWS ANN. § 205.65); *see also* 2003 Mich. Pub. Acts 23 (amending MICH. COMP. LAWS ANN. § 205.27a), discussed *supra* at note 149 and accompanying text.

181. *See* MICH. COMP. LAWS ANN. § 205.93a (West 2003); *see also* WPGP1, Inc. v. Dep't of Treasury, 240 Mich. App. 414, 416, 612 N.W.2d 432 (2000). As a practical matter, compliance with the use tax is voluntary because transactions subject to the tax must be reported to the state by the taxpayer. The state has limited ability to enforce the tax under most circumstances, and can only easily enforce the tax on goods brought into Michigan that must be registered with a state agency, like motor vehicles and aircraft. *See id.*

182. 261 Mich. App. 248, 680 N.W.2d 504 (2004).

183. 225 Mich. App. 274, 570 N.W.2d 476 (1997), *overruled by Birchwood Manor*, 261 Mich. App. at 249, 680 N.W.2d at 505.

184. MICH. COMP. LAWS ANN. § 205.94d (West 2003).

prescribed by a licensed physician or other health professional" for a "designated person,"[185] which is nearly identical to the definition of "prescription drug" in the General Sales Tax Act.[186] In *CompuPharm*, the court of appeals had relied on its decision in *Syntex Laboratories, Inc. v. Department of Treasury*,[187] which had interpreted the term "prescription drug" as it is used in the Michigan Constitution, to interpret the meaning of "prescription drug" as it is defined in the General Sales Tax Act. The *CompuPharm* court applied the same "common understanding" approach that *Syntex* had applied in the constitutional context, and concluded that under the General Sales Tax Act, a "prescription drug" is a drug "that can be bought only as prescribed by a physician," focusing on "the nature of the drug" rather than "whether the drug has actually been dispensed pursuant to a prescription."[188] Because of the similarity between the definitions in the General Sales Tax Act and the Use Tax Act, the initial panel in *Birchwood Manor* concluded that it was compelled to follow *CompuPharm,* though otherwise it would have concluded that a drug dispensed by a pharmacist pursuant to a written prescription is a prescription drug for purposes of the use tax.[189]

The conflict panel in *Birchwood Manor* rejected the *Syntex* approach, holding that the "common understanding" approach applied in the constitutional context should not be used in applying the statutory definition in this case. Rather, it explained that a "plain language" approach should be applied to statutory language:

> The differing goals of statutory interpretation and constitutional interpretation indicate that *Syntex's* analysis cannot simply be transferred to the statutory definition. The goal of either type of interpretation is to ascertain and give effect to the purpose and intent of the provision. However, when interpreting a statute, one aims to determine the intent of the legislature that passed the provision, and the plain and ordinary meaning of the language

---

185. *Id.*

186. *See, e.g.*, MICH. COMP. LAWS ANN. § 205.54g; *See also Birchwood Manor,* 261 Mich. App. at 251 n.2, 680 N.W.2d at 506 n.2.

187. 188 Mich. App. 383, 389, 470 N.W.2d 665 (1991).

188. 225 Mich. App. at 277-78, 570 N.W.2d at 478 (internal quotations omitted).

189. Birchwood Manor, Inc. v. Comm'r of Revenue., 258 Mich. App. 801, 811, 673 N.W.2d 438 (2003), *vacated by* 261 Mich. App. 248, 249, 680 N.W.2d 504, 505 (2004).

> governs. By contrast, constitutional interpretation aims to determine the intent of the people who adopted the provision, and the rule of common understanding applies.[190]

Applying the "plain meaning" approach, the court concluded that the statutory definition of "prescription drug" in the Use Tax Act was clear and unambiguous, and held that the drugs at issue were exempt because they were dispensed by pharmacists pursuant to a written prescription from physicians for use by particular persons.[191]

B. Use Tax Time Limitation

Rendering obsolete another court of appeals decision, the Michigan Legislature amended the Use Tax Act to provide a presumption that property brought into Michigan either more than ninty days after its purchase by a non-resident, or more than 360 days after its purchase by a Michigan resident, is not subject to the tax.[192] Previously, the Act only provided that if property was brought into Michigan within ninty days after its purchase, it was presumed to be subject to the tax.[193] In *Guardian Industries Corp. v. Department of Treasury*,[194] the court of appeals concluded that under the prior statutory language, just because a property was first brought into Michigan ninty days after its purchase, that property

---

190. *Birchwood Manor*, 261 Mich. App. at 257, 680 N.W.2d at 509 (internal citations and quotations omitted). This emphasis on the differences between statutory and constitutional interpretation is a fine point often overlooked in Michigan law. The distinction has deep roots, having been invoked by Chief Justice Marshall in the United States Supreme Court's historic opinion addressing the "necessary and proper" clause in McCulloch v. Maryland, 17 U.S. 316, 407 (1819), for example, as well as in Michigan cases. *See* Traverse City Sch. Dist. v. Attorney Gen., 384 Mich. 390, 405, 185 N.W.2d 9 (1971). Nevertheless, because the "common understanding" and "plain meaning" approaches would often yield the same understanding of language, courts sometimes lose sight of the subtle distinctions between them. The Michigan Supreme Court, however, has not accepted the argument that the two are equivalent. *See, e.g.,* Musselman v. Governor, 448 Mich. 503, 531, 533 N.W.2d 237, 249 (1995) (Riley, J., concurring in part and dissenting in part).

191. *Birchwood Manor*, 261 Mich. App. at 258-59, 680 N.W.2d at 510.

192. *See* 2003 Mich. Pub. Acts 27 (amending MICH. COMP. LAWS ANN. § 205.93).

193. *See* MICH. COMP. LAWS ANN. § 205.93 (West 2003) (historical and statutory note).

194. 243 Mich. App. 244, 621 N.W.2d 450 (2000).

was neither exempt from the use tax nor was it presumed to be exempt from the use tax.[195] The court concluded that the statute's plain language only addressed property brought into Michigan within ninty days of its purchase, but provided nothing for other properties. It therefore affirmed the tax tribunal's decision that an aircraft that was first brought into Michigan more than ninty days after its purchase was subject to the use tax.[196]

The 2003 amendment to the Use Tax Act takes a different approach, stating that it "shall be presumed" that certain property brought into Michigan is not subject to the tax.[197] Under the amendments, it shall be presumed:

> That tangible personal property used solely for personal, nonbusiness purposes that is purchased outside of this state and that is not an aircraft is exempt from the tax levied under this act if 1 or more of the following conditions are satisfied:
> (i) The property is purchased by a person who is not a resident of this state at the time of purchase and is brought into this state more than 90 days after the date of purchase.
> (ii) The property is purchased by a person who is a resident of this state at the time of purchase and is brought into this state more than 360 days after the date of purchase.[198]

With this change, the *Guardian Industries* court's statement that the statute says nothing about property brought into Michigan more than 90 days after its purchase is no longer true.[199]

VII. TAX PROCEDURES

Several decisions and legislative changes that occurred during the *Survey* period addressed procedural aspects of Michigan tax law, including

---

195. *Id.*

196. *Id.* at 252, 621 N.W.2d at 455.

197. 2003 Mich. Pub. Acts 27 (amending MICH. COMP. LAWS ANN. § 205.93).

198. *Id.*

199. In one other change to the Use Tax Act, the legislature deleted certain language that would be redundant regarding successor liability and corporate dissolution in light of language added to the Revenue Act. *See* Mich. Pub. Acts 24 (amending MICH. COMP. LAWS ANN. § 205.96); *see also supra* note 109 and accompanying text.

the Michigan Tax Tribunal's jurisdiction, the applicability of the Open Meetings Act and the Freedom of Information Act to the Tribunal, and the availability of information from the Michigan Department of Treasury.

First, in *Highland-Howell Development Co., L.L.C. v. Marion Township*,[200] the supreme court commented on the exclusive jurisdiction of the tax tribunal.[201] The plaintiff sued Marion Township in circuit court for failing to build a sewer line on plaintiff's property, as the Township had promised, after the Township imposed a special assessment for the sewer line. Marion Township moved to dismiss the complaint, arguing that it was within the tribunal's exclusive jurisdiction. The circuit court granted the motion and dismissed the complaint.[202] Based on the Tax Tribunal Act granting the tribunal "exclusive and original jurisdiction" over only decisions "relating to assessment, valuation, rates, special assessments, allocation, or equalization under property tax laws," the supreme court reversed, stating that claims for "breaches of promise or contract are not within the scope of the statutory provision, and therefore are within the circuit court's jurisdiction."[203]

The court of appeals also addressed the tax tribunal's ability to hold closed sessions. In *Herald Company, Inc. v. Tax Tribunal*,[204] the parties to a property tax appeal had stipulated to a protective order deeming certain information confidential, though the tribunal's hearing referee did not inquire whether the evidence encompassed by the order was actually confidential.[205] When evidence covered by that order was presented, the tribunal went into a closed session, excluding one of the Herald Company's reporters. Thus, the Herald Company sued the tribunal for violating the Open Meetings Act.[206]

The tribunal argued that under the FOIA, it did not have to disclose the information because the information was being used by the tribunal to develop governmental policy, which excused the tribunal from holding an

---

200. 469 Mich. 673, 677 N.W.2d 810 (2004).

201. *Id.*

202. *Id.* at 674-75, 677 N.W.2d at 811-12.

203. *Id.* at 676, 677 N.W.2d at 812. The court referred to MICH. COMP. LAWS ANN. § 205.731 (West 2003), in defining the tribunal's jurisdiction.

204. 258 Mich. App. 78, 669 N.W.2d 862 (2003).

205. *Id.*

206. *Id.* at 80-82, 669 N.W.2d at 865-66.

open meeting under the OMA.[207] But the court of appeals rejected that argument, stating that "the underlying tax assessment challenge was simply a tax determination involving a single taxpayer, lacking the policy-making potential contemplated by the Legislature in drafting" the "governmental policy" exemption from the FOIA.[208] For these reasons, the court held that tribunal had violated the OMA.[209]

However, the court of appeals did not leave parties appealing their assessments before the tribunal with no protection for their confidential information. It held that under the Michigan Court Rules and the Administrative Procedures Act, the tribunal can provide protection for confidential information, but the information must actually be confidential.[210] One of the problems that the court identified in *Herald Company* was that the tribunal referee never inquired into whether the information was actually confidential.[211] Without such a determination, it was not clear whether the scope of the stipulated protective order had any relationship to the need for confidentiality.

Finally, in another change dealing with the availability of information, an amendment to the Revenue Act provides that the Department of Treasury must make all of its bulletins and letter rulings available to the public.[212] Before the amendment, the Revenue Act provided only that the "department may periodically issue bulletins that index and explain current department interpretations of current state tax laws."[213]

VIII. CONCLUSION

In closing, the *Survey* period included a number of changes in both legislation and judicial decisions governing Michigan taxation. These

---

207. *Id.* at 84, 669 N.W.2d at 867. The FOIA exemption is MICH. COMP. LAWS ANN. § 15.243(1)(*f*) (West 2003), and the OMA provides that if information is exempted from disclosure by statute, then a governmental body may hold a closed session to discuss that information. *See* MICH. COMP. LAWS ANN. § 15.268(*h*) (West 2003).

208. *Herald Co.*, 258 Mich. App. at 85, 669 N.W.2d at 867.

209. *Id.*

210. *Id.* at 88-89, 669 N.W.2d at 869. The court considered a definition from the Uniform Trade Secrets Act to provide guidance on the kind of information that is "confidential." *See* MICH. COMP. LAWS ANN. § 445.1902(*d*) (West 2003).

211. *Id.* at 90, 669 N.W.2d at 870.

212. *See* 2003 Mich. Pub. Acts 92 (amending MICH. COMP. LAWS ANN. § 205.3).

213. MICH. COMP. LAWS ANN. § 205.3 (West 2003) (historical and statutory notes).

changes in Michigan law abolished outdated policies, adopted new policies that seek efficiency and uniformity, and left open matters that will certainly result in additional changes in the future.