STATE OF MICHIGAN
IN THE COURT OF APPEALS

Associated Builders and Contractors of Michigan, National Federation of Independent Business, Inc., Senator Edward McBroom in his official capacity, Representative Dale Zorn, in his official capacity, Rodney Davies, Kimberley Davies, Owen Pyle, William Lubaway, Barbara Carter, and Ross VanderKlok

Plaintiffs/Appellants

v.

Treasurer of Michigan, Rachael Eubanks, in her official capacity

Defendant/Appellee

COA No. 369314

Case No.: 23-000120-MB

Hon. Elizabeth L. Gleicher

THIS CASE INVOLVES AN INVALID EXECUTIVE ACTION UNDER MCR 7.204(D)(3)(c)

Patrick J. Wright (P54052)
Derk A. Wilcox (P66177)
Stephen A. Delie (P80209)
Mackinac Center Legal Foundation
Attorneys for Plaintiffs/Appellants
140 West Main Street
Midland, MI 48640
(989) 631-0900 – voice
(989) 631-0964 – fax

PLAINTIFFS/APPELLANTS' REPLY

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INTRODUCTION

This matter concerns the construction of MCL 206.51(1), which sets Michigan's income tax rate. Defendant/Appellee State Treasurer (the Treasurer) announced that, pursuant to MCL 206.51(1)(c), the rate decreased from 4.25% to 4.05% for tax year 2023. Prior to that announcement, the Attorney General, at the Treasurer's request, issued an opinion stating that any year the tax rate decreases, it will revert to 4.25% for the next tax year's analysis under the MCL 206.51(1)(c) formula. P/A App'x at 43-46. Plaintiffs/Appellants filed suit to have the statute properly applied.

Plaintiffs/Appellants have filed a brief and the Treasurer has filed a response.

In the Treasurer's response, she: (1) conflates standing in the merits regarding whether Plaintiffs/Appellants have shown a special injury; (2) claims that individual taxpayers are not currently having their taxes withheld at a rate over 4.05%, which goes to their standing; (3) claims this Court cannot enter declaratory relief because the Legislature might change MCL 206.51(1) at any time thereby making the matter not ripe; (4) ignores an argument related to an alternative policy consideration; and (5) also ignores a 2023 Michigan Supreme Court case indicating that, when interpreting statutes for clarity, legislative knowledge is an appropriate consideration.

These matters will be addressed in turn.

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ARGUMENT

I. The Plaintiff/Appellant legislators and advocacy groups have shown a special injury.

Four separate times, the Treasurer argues some variation of "Appellants provide little to no analysis on how a desire for a permanent tax rate would contravene a constitutional right to revenue *estimates*." Treasurer's Brief at 1, 9 (cited quote), 12, and 13.

This conflates standing and the merits. Plaintiffs/Appellants need to show a special injury to establish standing to reach the merits (i.e. the proper construction of MCL 206.51(1)). To show their special injury, the legislators have pointed to Const 1963, art 4, § 31, which guarantees one of the first general appropriation bills for the budget cycle will "contain an itemized statement of estimated revenue by major source." *Id.*[1]

The permanence of the income tax rate goes to the merits. Plaintiffs/Appellants are not arguing that Const 1963, art 4, § 31 requires a permanent income tax rate. Rather, they contend they have been specially injured because the improper construction of MCL 206.51(1) has led to vast errors in the revenue estimates needed for budgeting. The constitutional provision and its history were discussed at length in Plaintiffs/Appellants' Brief at pp 6-11, 20-24.

Further, while discussed in the mandamus section of her brief, the Treasurer makes an argument that goes to the existence of a special injury: "If Appellants' claims succeed based on a hypothetical shortfall alleged in this case, any legislator or lobbyist in any given year could circumvent the statutory budget/appropriation process via mandamus challenge in court."

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[1] Thus, there are two injuries alleged in this case: (1) a general injury for everyone overpaying income taxes (all 4.9 million taxpayers) because the statute has been construed incorrectly; and (2) a budgetary process injury (a special injury).

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Treasurer's Brief at 28. This is largely correct. Plaintiffs/Appellants contend that where a statute is misconstrued in such a way that would lead to a shortfall in revenue of hundreds of millions of dollars that legislators and advocacy groups have standing to seek to have the statute in question construed correctly. The Treasurer contends this would encroach on the Legislature's constitutional responsibility for taxation in violation of the separation of powers. But this is wrong. Courts construe statutes where litigants show they have standing to challenge them. There is nothing extraordinary about that. The instant matter involves income taxes. The next case this Court considers might be criminal, insurance, etc. All of these are subjects about which the Legislature can legislate on, and where proper parties are before the court, those statutes can be interpreted.

II. The individual taxpayers' claims are ripe, and they have standing.

In footnote 8 of her brief, the Treasurer cites to the Court of Claims' December 21, 2023 decision, which obviously predates January 1, 2024. It is cited for the contention that the individual taxpayers have not shown injury in fact. But, after that January date, individual taxpayers have had their income taxes withheld based on tax tables that presume a 4.25% rate.[2] Plaintiffs/Appellants contend MCL 206.51(1), when properly construed, means that the most the income tax rate could be for tax year 2024 is 4.05%.

Further, the fact that many taxpayers might eventually get a refund for the 2024 tax year (if the statute is construed correctly) does not alleviate the harm of millions of taxpayers

[2] Michigan employers are required to withhold income taxes and the Michigan Department of Treasury may issue withholding tables (the current table still uses 4.25% and thus leads to too much being withheld). See MCL 206.703(2).

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overpaying now via having too much withheld from their paychecks. MCL 205.30(3) does allow interest on tax refunds owed by the Treasury, but that interest only begins to accumulate "commencing 45 days after the claim is filed or 45 days after the date established by law for the filing of the return, whichever is later."[3] Typically, individual income tax filings are due on April 15 in the calendar year after the tax year in question. MCL 206.315(5).

Thus, even if there is a future refund, at the time of filing this document, individual taxpayers that are having 4.25% withheld are losing the use of their money until sometime after April 15, 2025, and will not receive any interest for the use of their 2024 taxes before that date as it is only after both a claim has been filed and that April 15, 2025 date will have passed that interest can begin to accrue. Thus, individual taxpayers cannot receive any interest for their improperly withheld 2024 income taxes at the 4.25% level when the most that tax rate can be is 4.05%.

This obviates any need to consider the Treasurer's claim that future legislation might change the income tax rate. It is speculative that any such legislation would pass, and the individual taxpayers are being harmed now. Assuming for the sake of argument that some future legislation might pass that could somehow cure this use-of-money harm and also provide interest, then the Treasurer can come to court and make a mootness claim. Until such time, Plaintiffs/Appellants have shown they have standing, and their claims are ripe.

[3] See also https://www.michigan.gov/taxes/rep-legal/rab/rabhtml/2020/revenue-administrative-bulletin-2020-24 (last visited February 18, 2024). In essence, the Department of Treasury is being penalized for instances where it takes a long time to issue a refund.

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III. Plaintiffs/Appellants interpretation of MCL 206.51(1) is superior.

The Treasurer's arguments related to the merits are generally the same ones made at the Court of Claims and were addressed in Plaintiffs/Appellants' merits brief at this Court. Two arguments presented in Plaintiffs/Appellants' Brief that the Treasurer largely ignores do require some additional discussion.

First, the Attorney General, the Treasurer, and the Court of Claims all contend that any income tax cut from MCL 206.51(1)(c) is limited to one year because the trigger is based on the financial circumstances that occur within a single fiscal year. For example, the Court of Claims stated: "Logically, it would make little sense to provide a permanent tax cut based on economic circumstances that exist in one calendar year." P/A App'x at 141-42. Meanwhile, the Attorney General opined: "But because that situation is only temporary, it makes sense that, rather than provide a permanent tax reduction based on the (perhaps unusual) economic circumstances of a single fiscal year, the Legislature intended the relief to taxpayers to be only temporary as well." *Id*. at 45.

These are incorrect. The statute uses fiscal year 2020-21 as a baseline and for each year further removed from that date, a longer time period is incorporated into the calculation of the formula.

In January 2023, the House Fiscal Agency explained that:

> Public Act 180 of 2015 amended the income tax act so that beginning with tax year 2023, in the event general fund revenue growth exceeds certain levels the income tax rate will be automatically reduced. The base of the trigger is FY 2020-21 general fund revenue, and that amount is multiplied by cumulative inflation and an adjustment factor of 1.425 to determine the level of capped revenue in subsequent years. For tax year 2023, the level of capped revenue is based on the

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> inflation-adjusted growth (including the adjustment factor) between FY 2020-21 and FY 2021-22. For tax year 2024, the span would be FY 2020-21 through FY 2022-23.[[4]]

This means that the income tax rate formula is based on a multiyear determination and not based on a single fiscal year extraordinary event. Further, as we get farther and farther away from the baseline, the trigger should be harder to effectuate as the adjustment factor of 1.425 has to be overcome over a longer period. This is not a lightning in the bottle approach; rather, it is a measured approach to future economic revenue growth that would have significantly outpaced inflation and occurred over multiple fiscal years.

Even worse than this fundamental misunderstanding of the operation of the statute is the Treasurer's unwillingness to grapple with the idea that many 2015 legislators would have believed multi-year growth in revenue meant that a permanent tax cut could be afforded. Setting forth negative labels such as "policy argument" or "absurd results" does not substantively address whether rational legislators could hold this view, which is a critical factor in determining the context and clear meaning of MCL 206.51(1).

MCL 206.51(1) is not a snapshot; instead, it is a long-term economic panoramic. Once this is understood, the argument that MCL 206.51(1) is limited to a short-term fiscal analysis is undercut. Further, this understanding of the statute makes it even more unlikely that Plaintiffs/Appellants' construction of MCL 206.51(1) "could ultimately reduce the income tax rate to zero." P/A App'x at 141.

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[4] https://www.house.mi.gov/hfa/PDF/RevenueForecast/Economic_Outlook_and_Revenue_Estimates_Jan2023.pdf at 14 (last visited February 18, 2024).

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As noted in Plaintiffs/Appellants' Brief at 35-38 and 41-42, a policy the 2015 Legislature objectively could have chosen (and did choose) was for any income tax cut to be permanent on the entirely logical presumption that multi-year tax relief could be afforded when revenues significantly outpaced inflation.[5] Recognizing this legitimate and mainstream tax and spending concept helps aid in the clear meaning analysis. But the Attorney General, the Treasurer, and Court of Claims never substantively address this argument and instead act as if the only choices are a one-year income tax cut or a tax cut that is destined to go to zero.

The second matter that the Treasurer ignores is an argument related to 1983 PA 15. Plaintiffs/Appellants used that act to show that the Legislature knew how to use a constant (in that case 3.9%) to start a complex formula for determining the income tax, which therefore meant that the 2015 Legislature was more likely to have meant "current rate" to mean the "most recent rate."

The Court of Claims did not look upon this 1983 legislation as a source of legislative knowledge about how to use a fixed constant to start an income-tax formulation:[6]

> The Court disagrees that the 1983 version of the statute explains the Legislature's intent in relation to the 2015 amendment. The only thing that can be determined from the language of 1983 PA 15 is the fact that the Legislature intended for specific rates to apply for specific time periods.

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[5] This is true even if this Court does not consider the 2015 legislative proceedings where similar warnings were presented, and the rate-cut legislation passed anyway. Plaintiffs/Appellants' Brief at 43-45.

[6] In 1983, when the Legislature wanted to start its income tax formula with a constant tax rate, it used that tax rate. Specifically, the legislation stated: "3.9% plus the following rates for the specified periods" and then set forth complex formulas related to the "seasonally adjusted average state unemployment rate" in one subsection and "the state sales and use tax rates" in another subjection. 1983 PA 15.

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P/A App'x at 143.

To counter the Court of Claims, in their merit brief here, Plaintiffs/Appellants cited *Christie v Wayne State University*, 511 Mich 39 (2023) wherein the Michigan Supreme Court held that legislative knowledge of a practice was relevant to the statutory construction question. *Id*. at 54 ("The Legislature knows how to limit the effect of a provision . . . when it wished to do so."). The Treasurer did not address this 1-year-old precedent.

But *Christie* is not an aberration that should be ignored. In another 2023 Michigan Supreme Court case regarding statutory construction, *Andary v USAA Casualty Insurance Co*, 512 Mich 207 (2023), that court noted: "the Legislature knows how to make clear its intention that a statute apply retroactively." *Id*. at 247. In *Ottgen v Katranji*, 511 Mich 223 (2023), the Michigan Supreme Court again stressed the importance of prior legislative enactments: "the Legislature has shown it 'knows how to tweak the limitations period in the medical malpractice context.'" *Id*. at 234 (citation to quote omitted).

Three one-year old Michigan Supreme Court cases are enough to prove the point, but the Michigan Reports are replete with cases supporting the concept. Past legislative practice is relevant because it helps this Court decide the parties' competing definitions of "current rate" in the interpretation of MCL 206.51(1)(c). Plaintiffs/Appellants contend that had the Legislature meant MCL 206.51(1)(c)'s "current rate" to mean MCL 206.51(1)(b)'s 4.25%, it would have just used "4.25%" in place of "current" just as it used a fixed numeric rate (3.9%) in 1983's PA 15.

Under clear meaning analysis, Plaintiffs/Appellants have the better reading of MCL 206.51(1)(c). All the words have meaning, the policy (permanent tax relief when sufficient year over year revenue growth) is mainstream and logical, and it aligns with past legislative practice. The test is not whether there was a better or clearer way to accomplish codifying the legislative

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policy; rather, the test is whether the way chosen provides the clearest reading. Plaintiffs/Appellants' construction does.

RELIEF REQUESTED

For the reasons stated above, this Court should hold that the income tax rate cut from MCL 206.51(1)(c) remains in place until such time as the formula from that subsection would cause it to lower again thereby setting that newer lower rate as the income tax rate cap until the formula would cause it to go lower again.

Respectfully Submitted,

Dated: February 19, 2024

/s/ Patrick J. Wright
Patrick J. Wright (P54052)
Mackinac Center Legal Foundation
Attorneys for Plaintiffs/Appellants

STATEMENT OF COMPLIANCE WITH MCR 7.212(G)

I hereby certify that this brief is compliant with MCR 7.212(G). The brief contains 2,376 words.

Dated: February 19, 2024

/s/ Patrick J. Wright
Mackinac Center Legal Foundation
Attorney for Plaintiffs/Appellants

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