

STATE OF MICHIGAN
COURT OF APPEALS

FORD MOTOR COMPANY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellant.

UNPUBLISHED

January 8, 2013

No. 306820

Court of Claims

LC No. 06-000182-MT

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant Michigan Department of Treasury appeals as of right from the trial court order granting plaintiff Ford Motor Company's request for refund and overpayment interest and awarding attorney fees to plaintiff in this case arising under Michigan's repealed Single Business Tax Act (SBTA), MCL 208.1 *et seq.*¹ We affirm in part, reverse in part, vacate in part, and remand to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

The initial dispute between the parties arose out of defendant's audit of plaintiff to determine the tax due under the SBTA for the years 1997 through 2001. Defendant sent an August 3, 2005, audit determination letter² informing plaintiff that the contributions it had made

¹ The SBTA was repealed by 2006 PA 325.

² The August 3, 2005, audit determination letter stated:

Michigan Department of Treasury[,] Audit Determination Letter[,] Single Business Tax[,] Taxpayer Name: FORD MOTOR COMPANY[,] Account No. 380549190[,] Audit Determination[,] Audit Period: 12/01/1997 to 12/31/2001[,] Net Tax Due \$ 19,742,347[,] Interest 1,641,958[,] Penalty 0[,] Total Amount Due 21,384,305[,] The above determination is subject to final review and approval by the Michigan Department of Treasury. . . Taxpayer ___ agrees with this determination. ___ disagrees with this determination . . . Appeal Rights[,] If you disagree with this deficiency, please wait until

into its voluntary employee benefit association (VEBA) trust, 26 USC 501(c)(9), were compensation taxable to employees under the SBTA. Plaintiff responded to the letter by checking the box on the letter marked “disagrees with this determination” and returning the letter to defendant the same day. Plaintiff also requested an informal conference with defendant to contest the determination.

Before the informal conference was conducted, defendant sent plaintiff a Final Audit Determination letter dated September 15, 2006. Defendant assessed plaintiff a tax liability of approximately \$20 million above the single business taxes already paid by plaintiff. Defendant also indicated that plaintiff owed approximately \$2 million in tax deficiency interest resulting from the unpaid tax. Plaintiff later withdrew its request for an informal conference.

Plaintiff paid the additional tax liability under protest and brought suit in the Court of Claims, arguing that contributions made to the VEBA trust were not compensation for purposes of the SBTA. Plaintiff also alleged that defendant owed plaintiff a refund of \$12,323.625 for overpayment of plaintiff’s SBTA liability. The trial court rejected plaintiff’s claim and granted summary disposition to defendant.

Plaintiff appealed, and this Court reversed the trial court’s order. This Court held that the contributions plaintiff made to the VEBA trust in the tax years in question did not constitute compensation under the SBTA and were not subject to the single business tax. *Ford Motor Co v Dep’t of Treasury*, 288 Mich App 491, 493; 794 NW2d 357 (2010).³

On August 29, 2011, plaintiff filed a motion in the trial court to enforce this Court’s judgment. Before the hearing date, defendant provided plaintiff a spreadsheet showing how it calculated that plaintiff was owed approximately \$15 million, rather than the \$17 million plaintiff claimed was due pursuant to this Court’s judgment. Defendant remitted payment to plaintiff in the amount of \$15,762,944 on September 19, 2011.

Plaintiff filed a revised motion seeking a refund of “Tax and Deficiency Interest Refund and Allowance of Overpayment Interest.” At the hearing on the motion the parties agreed in pertinent part that deficiency interest stops accruing as of the date when the delinquent tax is paid in full, that overpayment interest begins accruing 45 days after the date when the taxpayer provides the treasury department with adequate notice of a claim for refund of tax overpayment, and that plaintiff and defendant had an informal arrangement whereby defendant would accept “deposits” from plaintiff to cover potential tax liabilities and also to avoid being charged deficiency interest on such potential liabilities. The parties also agreed that as of April 30, 2000, plaintiff had approximately \$22 million in unassigned deposits with defendant, and that on

you receive a notice of “intent to assess” additional tax, penalty or interest and then file your written request for an informal conference (within 30 days after receipt) to the Michigan Department of Treasury[.]

³ The Supreme Court denied defendant’s application for leave to appeal. *Ford Motor Co v Dep’t of Treasury*, 488 Mich 1026; 792 NW2d 332 (2011).

October 31, 2002, plaintiff made another deposit, which was accompanied by a letter directing that \$12 million of the deposit be applied to plaintiff's alleged 1997 through 2001 tax deficiency.

The parties did not agree on the amount of refund that defendant owed plaintiff or on the amount of overpayment interest that defendant owed plaintiff. Plaintiff claimed that defendant owed plaintiff approximately \$17 million, while defendant claimed that the correct amount was approximately \$15 million. The figures differed because the parties disputed the date on which plaintiff actually paid the tax that was properly due, as well as the date on which plaintiff filed its claim for refund. Plaintiff asserted that it had enough funds on deposit to cover the amount of tax due on April 30, 2000, and that this is the date when deficiency interest stopped accruing. Defendant contended that the tax was not considered paid until plaintiff directed defendant to apply its deposit toward that particular tax deficiency.

Plaintiff also argued that the trial court should use September 17, 2005, to calculate the amount of overpayment interest defendant owed plaintiff because this date was 45 days after plaintiff responded to defendant's August 3, 2005, audit determination letter. Plaintiff argued that its response to defendant's audit determination letter constituted adequate notice of a claim of refund such as to start the clock against defendant in the accrual of overpayment interest. Defendant argued that plaintiff did not provide defendant with adequate notice of a claim for refund until 45 days after December 13, 2006, the date when plaintiff filed its initial complaint with the Court of Claims. According to defendant, plaintiff's response to the August 3, 2005, audit determination letter did not constitute a valid claim of refund because it consisted only of a box checked "disagrees with this determination," and was thus not detailed enough to constitute adequate notice of a claim for refund of overpayment of tax under Michigan's tax code.

The trial court granted plaintiff's motion, holding in pertinent part that as of September 15, 2011, the total amount defendant owed plaintiff was \$17,538,978.68, that defendant paid \$15,762,944.00 to plaintiff on September 19, 2011, that defendant continued to owe plaintiff \$1,776,034.68, plus overpayment interest of \$206.73 for each day after September 15, 2011, until the amount owing was paid in full, and that defendant owed plaintiff its costs and attorney fees for having to bring the motion to compel payment. The parties disputed the amount of attorney fees that should be awarded and, on February 6, 2012, the trial court entered a stipulated order that awarded plaintiff attorney fees in the amount of \$35,000. However, defendant reserved the right to appeal the award of attorney fees.

I

Defendant first argues that plaintiff's "check-the-box" for "disagrees with this determination" response to defendant's preliminary audit determination did not provide adequate notice of a claim for refund and, therefore, did not operate to start the running of the 45-day period after which interest begins to accrue on the claim. In order to determine whether plaintiff's "check-the-box" for "disagrees with this determination" response to defendant's preliminary audit determination letter provided adequate notice of a claim for refund, this Court must interpret Michigan's Revenue Act, MCL 205.1 *et seq.* Statutory interpretation is a question of law that this Court reviews *de novo* on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

This issue stems out of a disagreement between defendant and plaintiff regarding the interpretation of Michigan's Revenue Act. The parties disagree on the definitions of the terms "claim for refund" or "petition . . . for refund" as those terms are used to determine the start date for calculation of overpayment interest. MCL 205.30 reads in part:

(2) A taxpayer who paid a tax that the taxpayer claims is not due may petition the department for refund of the amount paid within the time period specified as the statute of limitations in section 27a. If a tax return reflects an overpayment or credits in excess of the tax, the declaration of that fact on the return constitutes a claim for refund. If the department agrees the claim is valid, the amount of overpayment, penalties, and interest shall be first applied to any known liability as provided in section 30a, and the excess, if any, shall be refunded to the taxpayer or credited, at the taxpayer's request, against any current or subsequent tax liability.

(3) The department shall certify a refund to the state disbursing authority who shall pay the amount out of the proceeds of the tax in accordance with the accounting laws of the state. Interest at the rate calculated under section 23 for deficiencies in tax payments shall be added to the refund commencing 45 days after the claim is filed or 45 days after the date established by law for the filing of the return, whichever is later.

Defendant collects taxes on behalf of the state. Defendant has the power to "promulgate rules . . . necessary to the enforcement of the provisions of tax and other revenue measures that are administered by the department." MCL 205.3(b).

MCL 205.3a grants defendant the authority to conduct audits. Defendant is required to send a letter of inquiry to any taxpayer with an alleged deficiency, unless: (1) the taxpayer filed a return showing a tax due but failed to pay that tax, (2) the deficiency was identified in an audit performed by Treasury, or (3) the taxpayer admitted that the tax was due and owing. MCL 205.21(2)(a). In the present case, since the alleged SBTA deficiency was identified during an audit performed by defendant, no letter of inquiry was required.

If a deficiency remains unresolved 30 days after a letter of inquiry is sent, or if no letter of inquiry was required to be sent, defendant then must give notice to the taxpayer of its intent to assess the tax. MCL 205.21. This notice must inform the taxpayer of the amount alleged to be owed, the reason for the alleged deficiency, and that the taxpayer has the right to an informal conference to be requested in writing within 60 days. *Id.*

Plaintiff requested an informal conference regarding its alleged SBTA deficiency, but eventually canceled that request pursuant to MCL 205.21(2)(d). Plaintiff's response to defendant's August 3, 2005, audit determination letter was to check the box marked "disagrees with this determination" and return it to defendant. Thus, this Court must determine whether such a response fits the definition of the seemingly interchangeable terms "petition . . . for refund" and "claim for refund" as the terms are used in the revenue act.

The terms “petition . . . for refund” and “claim for refund” are statutory. A court’s primary goal when conducting statutory interpretation is to ascertain and effectuate legislative intent. *Michigan Ed Ass’n v Secretary of State (On Rehearing)*, 489 Mich 194, 217; 801 NW2d 35 (2011). This Court “may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.” *Id.* at 217-218, quoting *Omne Fin, Inv v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) (citations omitted).

If statutory language is plain and unambiguous, judicial interpretation is not permitted. *Niles Twp v Berrien Co Bd of Comm’rs*, 261 Mich App 308, 313; 683 NW2d 148 (2004). However, statutory construction is appropriate if the statutory language is ambiguous. *Adrian School Dist v Mich Pub School Employees Retirement Sys*, 458 Mich 326, 332; 582 NW2d 767 (1998). In such cases, it is proper for a court to “go beyond the statute’s words in order to ascertain legislative intent.” *Niles Twp*, 261 Mich at 314. Ambiguity exists if reasonable minds can differ as to the exact meaning of a statute. *Id.*

We must determine whether the terms “petition . . . for refund” and “claim for refund” are ambiguous. In *Lindsay Anderson Sagar Trust v Dep’t of Treasury*, 204 Mich App 128; 514 NW2d 514 (1994), this Court stated that “[t]he only possible ambiguity in the statute would be the question when a claim for refund is considered to be filed.” *Id.* at 132. Thus, some ambiguity does exist regarding the definition of the terms “petition . . . for refund” and “claim for refund.” In *Sagar Trust* the Court offered some guidance by stating that “a claim is filed when defendant receives adequate notice of the claim.” *Id.* Consequently, we must determine when “adequate notice” of a claim for refund is considered to have been given.

When engaging in statutory construction a court must consider the goal of the statute, as well as any harm the statute was designed to remedy, and apply a reasonable construction to best carry out the purpose of the statute. *Marquis v Hartford Accident & Indemnity*, 444 Mich 638, 644; 513 NW2d 799 (1994). However, in so doing a court “should not abandon the canons of common sense.” *Id.*

Plaintiff argues that it provided defendant with adequate notice of a claim for refund when it checked the box marked “disagrees with this determination” on the August 3, 2005, audit determination letter and returned it to defendant. However, such a contention simply does not comport with MCL 205.21(5), which provides taxpayers with the procedure for converting a “contest” of the assessment” into a “claim for a refund.” MCL 205.21(5). The conversion itself may be made “[d]uring the course of the informal conference under subsection (2)(d)[.]” *Id.* In order to make the conversion, the taxpayer must provide “written notice” of the conversion that “shall be accompanied by payment of the contested amount.” *Id.*

Plaintiff’s August 3, 2005, “check-the-box” response occurred before plaintiff submitted its November 17, 2005, request for an informal conference. Plaintiff eventually withdrew its request for an informal conference pursuant to MCL 205.21(2)(d). As such, it cannot be said that plaintiff’s August 3, 2005, response to the audit determination letter occurred “[d]uring the course of the informal conference[.]” MCL 205.21(5).

However, that does not mean that plaintiff's August 3, 2005, response could not be categorized as merely a "contest of the assessment" rather than a "claim for a refund." *Id.* MCL 205.21(5) makes it clear that the Legislature intended there to be a difference between the two terms. Plaintiff's August 3, 2005, response fits more clearly within the plain meaning of the term "contest of the assessment" than it does "claim for a refund." See *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470; 719 NW2d 19 (2006) ("To effectuate the intent of the Legislature, we interpret every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage.").

When plaintiff's response to defendant's August 3, 2005, audit determination letter is viewed in context of MCL 205.21(5), it becomes evident that by checking the box marked "disagrees with this determination[.]" plaintiff was merely providing defendant with notice of its "contest of the assessment[.]" MCL 205.21(5). In order for such a response to constitute adequate notice of a claim for refund, MCL 205.21(5) requires the taxpayer to "convert his or her contest of the assessment to a claim for a refund" "by written notice[.]" However, plaintiff failed to provide defendant with such written notice of its intent to convert the contest of the assessment into a claim for refund. Thus, trial court clearly erred when it found that overpayment interest began to accrue against defendant 45 days after plaintiff's "check-the-box" response to the August 3, 2005, audit determination letter.

The trial court correctly referred to plaintiff's August 3, 2005, response as "notice to the Department that Ford was *contesting the tax determination.*" However, the trial court erred by concluding that such a finding meant that overpayment interest began to accrue against defendant 45 days from the date plaintiff notified defendant that it was contesting the tax determination. Rather, overpayment interest began to accrue 45 days after December 13, 2006, the date when plaintiff filed its complaint. This was the first time that plaintiff truly provided defendant with adequate notice of a claim for refund. See MCL 205.22.⁴

II

Defendant asserts that the trial court erred when it calculated the amount of deficiency interest due plaintiff. In order to determine when plaintiff's VEBA tax liability was considered to be paid in full so as to stop the accrual of deficiency interest, this Court engages in statutory interpretation. Accordingly, this Court's review is de novo. *Ambassador Bridge Co*, 481 Mich at 35.

Deficiency interest is generally chargeable against a taxpayer "from the time the tax was due, and until paid[.]" MCL 205.23(2). In this case the trial court essentially held that plaintiff's

⁴ The decision in *NSK Corp v Dept of Treasury*, 481 Mich 884; 748 NW2d 884 (2008), is distinguishable. In that case the taxpayer was informed of its overpayment and entitlement to refund by Treasury in an audit determination letter, to which the taxpayer responded in agreement. Such a situation does not come within the straightforward purview of MCL 205.21(5). Since the taxpayer asserted its agreement with the audit determination, it cannot be rightly said to qualify as a "contest of assessment" under the Act. MCL 205.21(5).

tax deficiency was paid, thus ending the accrual of deficiency interest, as of April 30, 2000. April 30, 2000, is the date when, according to plaintiff, deposit funds were made available to defendant in an amount sufficient to cover the tax deficiencies that were properly due to defendant.

Defendant argues that October 31, 2002, is the date on which the accrual of deficiency interest stopped. On that date, plaintiff mailed to defendant an additional deposit payment with instructions to apply approximately \$12 million of that deposit toward plaintiff's alleged SBTA deficiency.

In order to make a determination regarding the date the accrual of deficiency interest against plaintiff ceased, this Court must consider the informal arrangement between plaintiff and defendant regarding "deposits." The actual agreement between plaintiff and defendant regarding the type of deposits at issue was never memorialized in writing, but rather existed only as an informal arrangement. The parties agree that the purpose of these deposits is to prepay potential tax liabilities in order to avoid tax deficiency penalties and interest.

Plaintiff asserts that such deposits should count as payment for any tax liability existing on the date when the deposited funds are first made available to defendant. Defendant contends that funds on deposit only count as payment for a particular tax liability existing on the date the taxpayer provides defendant with instructions to apply the deposited funds towards that particular tax liability. We conclude that the trial court correctly found that the date the funds were made available to defendant was the date on which the accrual of deficiency interest should cease, without regard to whether the funds were deposited with specific instructions regarding which particular tax liability to which the funds should be applied.⁵ Defendant has offered no authority on which this Court could rely to reach a contrary decision. Thus, this Court can consider Treasury to have effectively abandoned this issue on appeal. See *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008). We conclude that defendant has abandoned this issue.

III

Lastly, defendant argues that an award of attorney fees is inappropriate in light of the "public question" involved. This Court reviews a lower court's decision to award attorney fees for an abuse of discretion. *Windemere Commons I Ass'n v O'Brien*, 269 Mich App 681, 682; 713 NW2d 814 (2006) ("The decision to award attorney fees, and the determination of the reasonableness of the fees requested, is within the discretion of the trial court.").

Plaintiff moved for attorney fees and filed a bill of costs. Defendant challenged the request for attorney fees. At a hearing on October 6, 2011, the trial court awarded attorney fees,

⁵ Defendant seems to argue that plaintiff is not entitled to a refund of any money deposited until such time as plaintiff provides defendant with adequate notice of a claim for refund. If defendant were to prevail on this argument, it would effectively deprive plaintiff of all benefit relating to the unspecified deposit transaction.

but gave no reasons for doing so. Thus, this Court has no basis on which to determine whether the trial court abused its discretion in awarding attorney fees. Consequently, we vacate the award of attorney fees and remand to the trial court for further consideration of this issue.

CONCLUSION

We reverse the trial court's holding that overpayment interest began to accrue against defendant 45 days after August 3, 2005. We affirm the trial court's decision to use April 30, 2000, as the date to end the accrual of deficiency interest. We vacate the award of attorney fees and remand to the trial court for further consideration of the issue. We do not retain jurisdiction. Because neither side prevailed in full, neither side shall tax costs.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering