

STATE OF MICHIGAN
IN THE SUPREME COURT

FIRST INDUSTRIAL,

Plaintiff-Appellee,

v

REVENUE DIVISION, DEPARTMENT OF
TREASURY, STATE OF MICHIGAN,

Defendant-Appellant.

Supreme Court No.

Court of Appeals No. 282742

Court of Claims No. 06-04-MT

T. Brown

08-18-09

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APPLICATION FOR LEAVE TO APPEAL

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Question Presented for Review

- I. **Section 23 of the Single Business Tax Act, as interpreted by the Michigan Department of Treasury in its Revenue Administrative Bulletin 1992-3, authorizes a transferee of assets to claim a business loss deduction carryover for any unused business loss of the transferor when the transferor completely discontinues operations and is no longer a taxpayer under the Single Business Tax Act. First Industrial Financing Partnership transferred assets to Appellee First Industrial Limited Partnership but did not completely discontinue business operations and was still a taxpayer under the Single Business Tax Act. Is Appellee Industrial entitled to a transfer of Financing Partnership's business loss carryover?**

Introduction

This case concerns the Single Business Tax Act, which has been repealed. However, the Michigan Court of Appeals Opinion at issue will have an ongoing and serious impact on the State's ability to raise revenue for three reasons.

First, the statute construed by the Court of Appeals to award a tax preference to Plaintiff-appellee has an identical counterpart in the new Michigan Business Tax Act. Thus, a Court relying on the Court of Appeals decision could conceivably, though incorrectly, award a similar preference under the Michigan Business Tax Act.¹

Second, the decision failed to apply repeated rulings from this Court regarding application of the plain language of a statute and specific rules regarding tax exemptions and preferences. Specifically, the Court of Appeals held that Plaintiff-appellee could claim a transferred business-loss deduction carryover from a related entity, under certain circumstances, provided that the transferor completely ceased operations in Michigan, even if it continued operations elsewhere. The Court of Appeals reasoned that nothing in the statute authorizing the business loss deduction carryover prevented this transfer. But nothing in the statute authorized the transferred tax preference either. Thus, the ruling failed to apply well-established rules of statutory construction that prohibit a Court from reading anything into a statute that is not supported by the language of the statute itself. Moreover, the Court of Appeals ignored consistent rulings from this Court that tax exemptions and preferences are to be construed against the taxpayer and in favor of the government and cannot be made out by implication.

¹ Treasury is not conceding that a tax preference under the Michigan Business Tax Act and under similar circumstances would be justified even if the Court of Appeals decision at issue were to stand. Any such decision would be incorrect, although it could conceivably be argued by a taxpayer.

Finally, the Court of Appeals decision empowers two taxpayers to improperly claim the same deduction. In applying the statute at issue, Treasury produced a Revenue Administrative Bulletin (RAB) allowing a transferred business loss deduction carryover, under certain circumstances, when the transferor completely ceased operations. Because the Court of Appeals ruled that the transferor need only cease operations in Michigan, transferring entities could improperly claim the same deduction. This is not mere speculation. Plaintiff-appellee concedes that the transferor in this case made such a "mistake." If bona fide and respected companies such as Plaintiff-appellee and the related transferor can make such a mistake, and such a mistake is difficult to discover, the potential losses from these companies and others to the State would be significant.

STATEMENT OF ORDER APPEALED FROM, GROUNDS, AND RELIEF SOUGHT

Appellant-Defendant, Michigan Department of Treasury, files this application for leave to appeal the Court of Appeals, issued August 18, 2009. In an unpublished opinion, the Court reversed the Michigan Court of Claims' Opinion and Judgment,² which upheld the Department's denial of Plaintiff's claimed carryover business loss deduction. Although MCL 208.23b(h) allowed a Single Business Tax (SBT) taxpayer to deduct available business losses from its SBT base, the statute is silent regarding whether a transferee is entitled to an SBT business loss carryover. However, RAB 1992-3 indicates that a transferee may deduct carryover business loss under certain circumstances, provided the "transferor completely discontinues operations and is no longer a taxpayer under the Single Business Tax Act."

The Court of Appeals reversed and remanded the Court of Claims judgment and ruled that the taxpayer was entitled to the transferred business loss carryover, reading the phrase "completely discontinues operations" in RAB 1992-3 to mean "completely discontinues operations" *in Michigan*.

The decision of the Court of Appeals is erroneous and this Court should grant review for the following reasons. First, this case concerns the Single Business Tax Act (SBTA) and is an issue of significant public interest because it affects state revenue and empowers multiple entities to improperly claim the same deduction, as occurred in this case.³

Second, the Court of Appeals read into clear statutory language an exception that is not supported by the language of the statute itself. Nothing in the statute at issue supports the tax exemption created by the Court, which the Court interpreted in favor of the taxpayer, despite this Court's long-standing rule that tax exemptions are to be interpreted in favor of the taxing unit.

² *First Industrial, LP v Michigan Department of Treasury*, unpublished per curiam opinion of the Court of Appeals issued August 18, 2009 (Docket No. 282742).

³ MCR 7.302(B)(2).

The Court's failure to abide by long established rules of statutory interpretation that evinces the legislative intent involves legal principles of major significance to the state's jurisprudence.⁴

Third, the decision by the Court of Appeals is clearly erroneous and will result in material injustice because it conflicts with the Legislature's clear intent by creating an exemption not supported by the clear language of the statute.⁵ Tax measures are adopted to raise revenue, and creating exemptions not supported by statute undermines the Legislature's ability to raise revenue, particularly given the potential for abuse when multiple entities improperly claim the same deduction.

The Department respectfully requests that this Honorable Court grant this application for leave to appeal, and that the Court ultimately reverse the August 18, 2009, unpublished opinion by the Court of Appeals.

⁴ MCR 7.302(B)(3).

⁵ MCR 7.302(B)(5).

STATEMENT OF PROCEEDINGS AND FACTS

A. Factual Background

This tax case presents the issue of whether Plaintiff-Appellee, First Industrial Limited Partnership (Appellee Industrial), is entitled to the portion of the business loss deduction (BLD) carryover related to the assets that were distributed to it on the Michigan assets it received from a partnership as a non-liquidating distribution of assets. The parties agreed to and submitted a Stipulation of Facts ("SOF") in this matter. A copy of the SOF is contained in Attachment 1.

In 1993, Appellee Industrial was formed by and is owned partly by First Industrial Realty Trust, Inc (Realty Trust).⁶ Realty Trust is also the sole owner of First Industrial Finance Corporation (Finance Corporation).⁷ Appellee Industrial is, itself, a partner of another partnership called First Industrial Financing Partnership (Financing Partnership), which was formed in May 1994.⁸ Finance Corporation is also a partner in Financing Partnership.⁹

In 1994 and 1995, Financing Partnership purchased various real property in Michigan for which it claimed a Capital Acquisition Deduction (CAD) from its SBT tax base pursuant to MCL 208.23.¹⁰ As a result of claiming CADs on those properties, Financing Partnership's single

⁶ Petitioner's Complaint (PC) ¶7; Attachment 2, Plaintiff's Response to Defendant's First Request for Production of Documents to Plaintiff, Exhibit A.

⁷ PC ¶7.

⁸ PC ¶7; Attachment 2, Plaintiff's Response to Defendant's First Request for Production of Documents to Plaintiff, Exhibit B.

⁹ PC ¶7; Attachment 2, Plaintiff's Response to Defendant's First Request for Production of Documents to Plaintiff, Exhibit B.

¹⁰ Attachment 3, ¶6, Affidavit of John Clancy, Auditor, Michigan Department of Treasury; Attachment 4, Plaintiff's Answers to Defendant's First Interrogatories to Plaintiff, Interrogatory Response 2b.

business tax base was reduced and in turn created business loss deductions pursuant to MCL 208.23b(h).¹¹

On January 1, 1998, Financing Partnership transferred all of its Michigan properties to Appellee Industrial.¹² The purpose of the transfer was to allow Appellee Industrial to hold most of the assets because it is the operating partnership for Realty Trust and the asset transfer represented a return on capital investment to Appellee Industrial for its prior contribution of capital to Financing Partnership in 1994.¹³

In 1999, Financing Partnership filed its 1998 single business tax annual return but did not recapture any previously claimed and unused CAD as required by MCL 208.23b.¹⁴ Financing Partnership never filed a "final" single business tax return that indicated that it had completely discontinued business operations.¹⁵ Financing Partnership continued to own and manage properties in other States after the 1998 asset transfer to Appellee Industrial.¹⁶ In September 1999, Financing Partnership received new Michigan properties through an Internal Revenue

¹¹ Attachment 3, ¶7, Affidavit of John Clancy, Auditor, Michigan Department of Treasury; Attachment 4, Plaintiff's Answers to Defendant's First Interrogatories to Plaintiff, Interrogatory Response 2a.

¹² Attachment 1, Stipulation of Fact (SOF) ¶ 8; Attachment 2, Plaintiff's Response to Defendant's First Request for Production of Documents to Plaintiff, Exhibit D.

¹³ Attachment 2, Plaintiff's Response to Defendant's First Request for Production of Documents to Plaintiff, Response 5c; Attachment 4, Plaintiff's Answers to Defendant's First Interrogatories to Plaintiff, Interrogatory Response 7.

¹⁴ Attachment 4, Plaintiff's Answers to Defendant's First Interrogatories to Plaintiff, Interrogatory Response 2c; Attachment 5, Plaintiff's Response to Defendant's First Requests for Admissions to Plaintiff, Response 1B.

¹⁵ Attachment 5, Plaintiff's Response to Defendant's First Requests for Admissions to Plaintiff, Response 1C; Attachment 6, Plaintiff's Answers to Defendant's Second Interrogatories to Plaintiff, Answer 3.

¹⁶ Attachment 2, Plaintiff's Response to Defendant's First Request for Production of Documents to Plaintiff, Exhibit E.

Code §1031 (26 USC 1031) like-kind exchange.¹⁷ As a result of this, Michigan property Financing Partnership had business activity in 1999 and was subject to the Single Business Tax Act (SBTA) for the 1999 year.¹⁸

Although Financing Partnership transferred all of its Michigan properties that it purchased in Michigan on January 1, 1998 to Appellee Industrial, Financing Partnership never reported a CAD recapture or the transfer of the business loss deduction (BLD) carryovers for those assets to Appellee Industrial on its 1998 or 1999 single business tax returns.¹⁹

At the same time Financing Partnership distributed all of its Michigan properties to Appellee Industrial on January 1, 1998, it also distributed cash to Finance Corporation in order to maintain parity among Finance Corporation and Appellee Industrial's capital accounts to ensure that Finance Corporation's general partnership interest remained the same after the distributions.²⁰

After the transfer of properties from Financing Partnership to Appellee Industrial, Appellee Industrial claimed \$135,099,663.00 as transferred, unused business loss deductions attributable to those properties on its 1998 SBT return.²¹ Appellee Industrial used the BLD carryover as an offset to its adjusted tax base for the years 1999 and 2000 but did not claim a CAD related to those properties.²²

¹⁷ Attachment 2, Plaintiff's Response to Defendant's First Request for Production of Documents to Plaintiff, Response 7, Exhibit F.

¹⁸ PC ¶11.

¹⁹ Attachment 3, ¶¶10, 12, Affidavit of John Clancy, Auditor, Michigan Department of Treasury.

²⁰ Attachment 4, Plaintiff's Answers to Defendant's First Interrogatories to Plaintiff, Interrogatory Response 3.

²¹ PC ¶14, Attachment 1, SOF ¶9; Attachment 7; Industrial's 1998 Single Business Annual Tax Return, Statement 1.

²² PC ¶14; Attachment 5, Plaintiff's Response to Defendant's First Requests for Admissions to Plaintiff, Response 3.

The Michigan Department of Treasury (Treasury) audited Appellee Industrial for single business tax for the tax period of 1995 through 2000.²³ Treasury disallowed Appellee Industrial's claimed 1998 BLD carryovers related to the property transfer from Financing Partnership.²⁴ As a result, Treasury determined that Appellee Industrial had single business tax liabilities for both 1999 and 2000 and issued Bill for Taxes Due (Intent to Assess) L924193 which reflected as of 09/02/03 tax due in the amount of \$1,056,255.00 and interest of \$241,280.87.²⁵ Appellee Industrial requested and received an informal conference.

The informal conference referee rejected Appellee Industrial's claims to the BLD carryover under RAB 1992-3, and alternatively the referee also rejected Appellee Industrial's claim for CADs related to the asset transfer. Treasury agreed with the recommendation and issued Final Bill for Taxes Due L924193 on November 02, 2005.²⁶ The assessment reflected a new increased total liability of \$1,412,844.18 due to the accrual of additional interest on the original tax amount.²⁷ Appellee Industrial paid the assessed tax and interest and then filed a two-count Complaint in the Court of Claims seeking a refund.²⁸

On September 7, 2007, the parties filed their respective Motions for Summary Disposition in the Court of Claims. Oral argument on the motions was heard on October 17, 2007. The Court of Claims issued an Opinion and Order granting Summary Disposition in Treasury's favor on December 11, 2007. A copy of this Opinion and Order is attached hereto as Attachment 11.

²³ Attachment 3, Affidavit of John Clancy, Auditor, Michigan Department of Treasury, ¶3.

²⁴ Attachment 1, SOF ¶13.

²⁵ Attachment 8, Bill for Taxes Due (Intent to Assess) L924193, dated 09/02/03.

²⁶ Attachment 9, Decision and Order of Determination, and Informal Conference Recommendation.

²⁷ Attachment 10, Bill for Taxes Due (Final Assessment) dated 11/02/05.

²⁸ PC.

Appellee Industrial then appealed the Final Order of the Court of Claims to the Michigan Court of Appeals. The Court of Appeals reversed and remanded the Court of Claims judgment and ruled that the taxpayer was entitled to the transferred business loss carryover, reading the phrase "completely discontinues operations" in RAB 1992-3 to mean "completely discontinues operations" *in Michigan*. The Court noted that other provisions of the SBTA provided that SBT was a value-added tax intended to impose a tax on the privilege of conducting business *in Michigan*. The Court also noted that "the statutory BLD does not provide for allowing a transferee to claim a BLD only if the transferor discontinues operations worldwide."

B. Overview of The Single Business Tax

The single business tax (SBT) is a modified value-added tax that taxes an economic actor based primarily upon what it consumes in the course of engaging in business activity, rather than what it earns.²⁹ "Business activity" is defined as:

a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible, or the performance of services, or a combination thereof, made or engaged in, or caused to be made or engaged in, within this state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others
[MCL 208.3(2).]

Under the SBT, the first step in determining a taxpayer's tax liability is to determine its tax base. The "tax base" is defined as business income subject to various adjustments.³⁰ It consists of federal taxable income, compensation, depreciation, interest, royalties, and other

²⁹ *Mobil Oil Corp v Dep't of Treasury*, 422 Mich 473, 493; 373 NW2d 730 (1985).

³⁰ MCL 208.9(1).

adjustments.³¹ The adjusted tax base is apportioned between Michigan and other States in which the taxpayer conducts business activities.³²

The tax base computation is designed to calculate the contribution each business made to the total economy; in economic terms, this contribution is the economic size of the business. Each business will pay tax proportionate to its economic size.³³

As such, a taxpayer whose business activities are confined solely to Michigan will have its entire tax base allocated to Michigan, while a taxpayer whose business activities is taxable both within and without Michigan will have its tax base apportioned to Michigan.³⁴

After apportionment, the tax base is subject to several additional adjustments.³⁵ These adjustments change the tax base from one based on income, to one based on business activity.³⁶ Three such adjustments are capital acquisition deduction (CAD), capital acquisition deduction recapture, and business loss deduction (BLD).

Section 23 authorizes a taxpayer to reduce its tax base by claiming a CAD.³⁷ The CAD allows a taxpayer to "recover the cost of certain tangible assets in the year of acquisition."³⁸ Since the SBTA does not include any specific provisions regarding the types of transactions that give rise to a CAD, Treasury, utilizing its authority granted by the Revenue Act to issue bulletins explaining Treasury's interpretation of current state tax laws, issued RAB 1992-3.³⁹

³¹ MCL 208.9.

³² MCL 208.40; MCL 208.41; MCL 208.45.

³³ Kasischke, *Computation Of The Michigan Single Business Tax: Theory And Mechanics*, 22 *Wayne L Rev* 1069, 1070 (1976).

³⁴ MCL 208.40; MCL 208.41.

³⁵ MCL 208.9

³⁶ *Jefferson Smurfit Corp v Dep't of Treasury*, 248 Mich App 271, 273-274; 639 NW2d 239 (2001).

³⁷ MCL 208.23; *Dana Corp v Dep't of Treasury*, 267 Mich App 690, 691; 706 NW2d 204 (2005), citing *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 409; 488 NW2d 182 (1992).

³⁸ *Dow Chemical Co. v. Dep't of Treasury*, 185 Mich App 458, 463-464; 462 NW2d 765 (1990).

³⁹ MCL 205.1 *et seq.*, MCL 205.3(f).

When the taxpayer sells or otherwise disposes of the asset, the "taxpayer must recapture (pay back) that portion of the capital acquisition deduction that has not been economically exhausted."⁴⁰ Section 23b of the SBTA specifically provides for the recapture of the CAD. It states in pertinent part:

After allocation as provided in section 40 or apportionment as provided in section 41, the tax base shall be adjusted by the following:

* * *

(b) Add the gross proceeds or benefit derived from the sale or other disposition of the tangible assets defined in subdivision (a) minus the gain and plus the loss from the sale reflected in federal taxable income and minus the gain from the sale or other disposition added to the tax base in section 9(6). This addition shall be multiplied by a fraction, the numerator of which is the payroll factor plus the property factor and the denominator of which is 2. As used in this subdivision, "sale or other disposition" shall not include the transfer of tangible assets that are leased back to the transferor under section 168(f)(8) of the internal revenue code.⁴¹

"The formula contained in this section effectuates recapture in situations where a 'sale or other disposition' is taxable at the federal level. The formula does not provide for recapture in 'nonrecognition dispositions,' which are situations in which gain or loss is not recognized under federal income tax law."⁴²

Additionally, section 23b(h) of the SBTA authorizes a taxpayer to take a BLD. It defines a business loss to mean:

a negative amount after allocation or apportionment as provided in chapter 3 and after adjustments as provided in section 23 and subdivisions (a) to (g) without regard to the deduction under this subdivision. The business loss shall be carried forward to the year next following the loss year as an offset to the allocated or apportioned tax base including the adjustments provided in subdivisions (a) to (g), then successively to the next 9 taxable years following the loss year or until the

⁴⁰ *Dow Chemical Co*, 185 Mich App at 463-464.

⁴¹ MCL 208.23b.

⁴² *Dow Chemical Co*, 185 Mich App at 463-464.

loss is used up, whichever occurs first, but for not more than 10 taxable years after the loss year.⁴³

Treasury also issued its interpretation of this subsection, in part, in its Revenue Administrative Bulletin 1992-3 (RAB 1992-3).⁴⁴ RAB 1992-3 indicates that a BLD may be transferred from a transferor to a transferee if the transfer involves one of eight transactions listed in RAB 1992-3(3E)(1-8). For transfers involving a partnership, qualifying transfers include a contribution to a partnership and a liquidation of a partnership interest.

The CAD and the BLD work in tandem in the year that a taxpayer acquires depreciable assets. Hence if the CAD claimed in year 1 exceeds the tax base then the so-called unused CAD creates a "business loss which may be carried forward successively to the next 10 taxable years, or until the loss is used, whichever occurs first."⁴⁵

⁴³ MCL 208.23b(h).

⁴⁴ Attachment 12, Revenue Administrative Bulletin 1992-3 (RAB 1992-3).

⁴⁵ Attachment 13, 1998 Single Business Tax Forms and Instructions, p 13; Attachment 12, RAB 1992-3(6B).

ARGUMENT

I. Section 23 of the Single Business Tax Act, MCL 208.23, as interpreted by Treasury in its RAB 1992-3, authorizes a transferee of assets to claim a business loss deduction carryover when 1) the transferor completely discontinues operations, and 2) the transferor is no longer a taxpayer under the SBTA. During the years at issue, Financing Partnership did not completely discontinue business operations and was still a taxpayer under the SBTA. Appellee Industrial is, therefore, not entitled to a transfer of a business loss deduction.

A. Standard of Review

Statutory interpretation is a question of law that is considered de novo on appeal.⁴⁶

B. RAB 1992-3 should be construed in Treasury's favor.

Although Treasury's bulletins do not necessarily have the force of law, the interpretation of a statute by those charged with its execution is entitled to the most respectful consideration and ought not to be overruled without cogent reasons.⁴⁷ Where the language of an agency rule is unambiguous on its face, the court should give effect to the plainly expressed intention of the agency.⁴⁸

Furthermore, to the extent that the SBTA §§23 and 23b(h) concern deductions which ultimately reduce a person's tax liability, they are more like exemptions from tax. If a rule of construction is to be applied to those sections because they are ambiguous then those sections must be construed in favor of Treasury.

⁴⁶ *Morales v Auto-Owners Ins Co*, 469 Mich 487, 490; 672 NW2d 849 (2003).

⁴⁷ "[T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature." *In re Complaint of Rovas*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935) (internal citations and quotation marks omitted).

⁴⁸ *Michigan Waste Systems v Department of Natural Resources*, 147 Mich App 729; 383 NW2d 112 (1985)..

This Court has routinely held that tax exemptions are disfavored and that any tax exemption must be strictly construed against the taxpayer:

Because tax exemptions are disfavored, the burden of proving entitlement to an exemption rests on [] the party asserting the right to the exemption. (Cite omitted). While we recognize that tax exemptions are strictly construed against the taxpayer because exemptions represent the antithesis of tax equality, we interpret statutory language according to common and approved usage, unless such construction is inconsistent with the manifest intent of the Legislature.⁴⁹

"The burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption . . . cannot be made out by inference or implication"⁵⁰

C. Appellee Industrial is not entitled to a transfer of business loss deduction.

The Court of Claims correctly held that Appellee Industrial is not entitled to the BLD carryover from Financing Partnership, and the Michigan Court of Appeals erred as a matter of law. As previously mentioned, although §23b(h) of the SBTA does not itself specifically state that a BLD incurred by one taxpayer may be transferred to another taxpayer, Treasury's RAB 1992-3, interpreting §23b(h), indicates that a BLD may be transferred from one entity to another. It provides, in pertinent part, as follows:

Transfers of property through certain tax-free events described in sub-paragraphs (1) through (8) of this section receive the following treatment for SBT purposes: transferor is not required to recapture CAD on such property; transferee is not entitled to a CAD on such property; transferee holds the property as if such property was in the hands of the transferor, therefore, the transferee must recapture CAD depending on the acquisition date of the property by the transferor; and *transferee is entitled to an SBT business loss carryover for any unused business loss of the transferor when transferor completely discontinues operations and is no longer a taxpayer under the Single Business Tax Act (SBTA).*

* * *

⁴⁹ *Elias Brothers Restaurants v Department of Treasury*, 452 Mich 144, 150; 549 NW2d 837 (1996).

⁵⁰ *Evanston YMCA Camp v State Tax Com*, 369 Mich 1, 8; 118 NW2d 818 (1962), quoting 2 Cooley on Taxation (4th ed), § 672, pp 1404-1408.

(2) Contribution to a partnership. The transfer of property where no gain or loss is recognized under IRC 721.

* * *

(4) Property distributed by a partnership to a partner(s) in a partial or complete liquidation of the partner(s) interest and the property is used in a business activity of an organization in which the partner(s) own a controlling interest (i.e., partners having at least 80% ownership in original partnership must have at least 80% ownership in new entity).

* * *

(8) Liquidation of partnership interest with no sale or exchange of property is a tax-free event providing such partnership is considered as continuing under Section 708 of the IRC. (Emphasis added).⁵¹

RAB 1992-3 thus indicates that in order for Appellee Industrial to be entitled to the BLD transfer from Financing Partnership, there must be a transaction identified in subparagraphs 2, 4, or 8.

There is no dispute that subparagraph 2—a contribution to a partnership, is not applicable because the complaint and stipulation of facts clearly state that the transfer was a distribution from a partnership to a partner.⁵² Further, there is also no dispute that the transfer of assets from Financing Partnership to Appellee Industrial was not a liquidation of a partnership interest under subparagraphs 4 or 8, because, again, the complaint and stipulation of facts state that Appellee Industrial's partnership interest in Financing Partnership did not change as a result of the asset transfer.⁵³ Accordingly, Appellee Industrial is not entitled to the BLD transfer pursuant to Treasury's interpretation of MCL 208.23 in its RAB 1992-3(3E).

Additionally, the plain language of RAB 1992-3 also provides that, in order for a transferee to qualify for the BLD carryover for any unused business loss of the transferor, the

⁵¹ Attachment 12, RAB 1992-3(3E).

⁵² PC ¶9; Attachment 1, SOF ¶32.

⁵³ PC ¶¶8 and 9; Attachment 1, SOF ¶¶ 7-8.

transferor must 1) "completely" discontinue operations and 2) no longer be a taxpayer under the SBTA. To satisfy the first prong of this test, Financing Partnership (the transferor entity) must have "*completely* discontinued operations" (emphasis added).

The American Heritage College Dictionary, 3rd Ed, defines the word "complete" as (1) having all necessary parts, elements, or steps...(4) Absolute; total..." Grammatically, the adverb "completely" is used to modify the clause "discontinues operations," emphasizing that it is not merely a partial discontinuation but a *total* and *absolute* discontinuation. Although the RAB is not a statute but rather Treasury's interpretation of a statute, applying the statutory construction rule that statutes should be construed to give each word meaning, requires finding "completely discontinues operations" to mean everywhere, not just in Michigan.⁵⁴ Indeed, not only does this construction apply the plain language, but this is the only logical interpretation that does not lead to an absurd result.

The Court of Appeals held, however, that "completely discontinues operations" means completely discontinues operations *in Michigan*. In doing so, the Court reasoned that "the statutory BLD does not provide for allowing a transferee to claim a BLD only if the transferor discontinues operations worldwide."⁵⁵ However, nothing in the plain language of the statutory BLD allows a transferee to claim a transferred BLD under any circumstances either. This Court

⁵⁴ *Council of Orgs & Others for Educ About Parochiaid v. Governor*, 455 Mich 557, 559; 566 NW2d 208 (1997).

⁵⁵ *First Industrial, LP v Michigan Department of Treasury*, unpublished per curium opinion of the Court of Appeals issued August 18, 2009 (Docket No. 282742), p 3. Attachment 18.

has routinely held that nothing may be read into the plain language of a statute that is not supported by the language of the statute itself.⁵⁶

Moreover, this Court has also repeatedly held that tax exemptions or preferences are to be construed in favor of the taxing unit.⁵⁷ By reasoning that the taxpayer was entitled to a statutory exemption because nothing in the statute prevented it, the Court of Appeals Opinion construed the tax benefit in favor of the taxpayer despite the lack of statutory language to support the tax preference and despite this well settled rule of construction regarding tax preferences. Further, to hold that an agency's interpretation of a statute includes a limitation not supported by the language of the interpretation or statute and contrary to the agency's stated interpretation is nonsensical. Treasury is simply applying RAB 1992-3 as written. Thus, before Appellee Industrial may qualify for a transfer of BLD, Financing Partnership must have completely discontinued all operations, regardless of location.

Furthermore, if RAB 1992-3 had intended that transferors only need to discontinue operations in Michigan, it would have been written to read "discontinue operations in Michigan" or perhaps "completely discontinue operations in Michigan." But RAB 1992-3 does not use such limiting language. The language at issue neither says, nor was it intended, to read as the Court of Appeals interpreted it. Instead, it means exactly what it says and that is that the transferor must *completely* end operations and not just in Michigan.⁵⁸ Treasury's sound rationale for requiring discontinuing operations everywhere is based on its difficulty of ensuring that a transferor of a

⁵⁶ "Nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

⁵⁷ *Elias Brothers Restaurants v Department of Treasury*, 452 Mich 144, 150; 549 NW2d 837 (1996).

⁵⁸ Attachment 14, Defendant's Answers to Plaintiff's Second Interrogatories, Interrogatory Response 7; Attachment 15, Defendant's Responses to Plaintiff's First Requests to Admit, Responses 7 and 8.

BLD who ceases operations only in Michigan within the ten year carry over period, and then reactivates business operations in Michigan is not continuing to claim the same BLD that it supposedly transferred. This makes perfect sense considering that two entities cannot legally claim the same BLD under the SBTA.

This case provides a prime example of why Treasury in its RAB 1992-3 indicates that a transferor must completely discontinue operations everywhere. Appellee Industrial admitted in its Motion for Summary Disposition, that due to a "mistake" both it and Financing Partnership claimed the exact same BLD.⁵⁹ However, it should be noted that Appellee Industrial never disclosed this one-hundred million dollar "mistake" at any time during the audit, the informal conference, or discovery. In fact, Treasury asked three times in its discovery whether Appellee Industrial and Financing Partnership were claiming the same BLD, and three times Appellee Industrial objected to responding on the basis that it was not relevant.⁶⁰

If RAB 1992-3 is interpreted as Appellee Industrial argues it should be, the potential for abuse will definitely increase due to Treasury's inability to effectively track businesses that merely temporarily cease business operations in Michigan but continue operations elsewhere. Despite the repeal of the SBTA, the potential for abuse might reoccur under the Michigan Business Tax (MBT) and will continue to impact state revenue. The MBT definition of "available business loss" in MCL 208.1201 is functionally identical to the definition in MCL 208.23b(h). A court relying on the Court of Appeals Opinion at issue could similarly hold that because MCL 208.1201 is silent on whether a transferor must completely cease operations everywhere, taxpayers may claim a deduction under similar circumstances.

⁵⁹ Plaintiff's Brief in Support of Summary Disposition, p16-17. Attachment 19.

⁶⁰ Defendant's Brief in Support of Summary Disposition; Attachment 4, Plaintiff's Answers to Defendant's First Interrogatories, response 2d; Attachment 6, Plaintiff's Responses to Defendant's First Request for Admissions, responses 4 and 5.

Additionally, if "completely discontinues operations" is construed as the Court of Appeals held, the phrase "no longer a taxpayer under the Single Business Tax Act" becomes redundant or surplusage. An entity that does not have business activity in Michigan is automatically not a taxpayer under the SBTA.⁶¹ Thus, if Treasury, in drafting the RAB, had intended that a transferor that ceased operations in Michigan but continued operation elsewhere could transfer the carryover BLD, there would have been no need to require that the transferor also completely discontinue operations *in Michigan*. On the other hand, if "completely discontinues operations" is read without the judicially created limitation and is applied regardless of location, both prongs have meaning. In construing a statute, courts should avoid any construction that renders any part of the statute surplusage or nugatory,⁶² and these same rules should apply by analogy to RABs as well.

Indeed, the fact that Treasury intended to make "completely discontinue operations" and "is no longer a taxpayer under the SBTA" two separate prongs is further illustrated by the use of the conjunctive "and" between the two phrases. The American Heritage College Dictionary, 3rd Ed, defines the word "and" as (1) together with or along with; also; in addition; as well. Used to connect words, phrases, or clauses that have the same grammatical function in a construction." The word "and" is also defined as "[a] conjunction connecting words or phrases, expressing the idea that the latter is to be added to or taken along with the first". Black's Law Dictionary, 5th Ed. These definitions dictate that these phrases are two completely separate and distinct requirements that must be met in order to establish entitlement to a transfer of BLD carryover. Again, every word, phrase, and clause must be given effect, and an interpretation that would

⁶¹ The term "taxpayer" as defined by MCL 208.10(2) of the SBTA, means "a person liable for a tax, interest, or penalty under this act."⁶¹ A person can only become a taxpayer under the SBTA if it has business activity in Michigan.⁶¹

⁶² *Grimes v Dep't of Transportation*, 475 Mich 72, 89; 715 NW2d 275 (2006).

render any part surplusage or nugatory should be avoided.⁶³ Thus the transferor entity must both completely discontinue operations *and* no longer be a taxpayer under the SBTA in order for the transferee to qualify for a transfer of BLD.

Here, Financing Partnership did not "completely discontinue operations." Appellee Industrial readily admits that Financing Partnership continued operations outside of Michigan.⁶⁴ Therefore, Appellee Industrial is not entitled to a transfer of the BLD. However, even if the phrase is interpreted as "completely discontinues business in Michigan", Appellee Industrial still does not satisfy this requirement because Financing Partnership did not cease having business activity in Michigan. In October 1999 Financing Partnership filed a SBT return for the 1998 tax year.⁶⁵ In that return, Financing Partnership states that it had a tax base apportionable to Michigan business activity in the amount of \$278,715.00.⁶⁶ Financing Partnership never filed a final SBT return for the 1998 tax year. This demonstrates that Financing Partnership had business activity in Michigan in 1998 and that it never completely discontinued operation in Michigan. Additionally, Financing Partnership continued to file SBT returns for 1999 and 2000. This further proves that Appellee Industrial is not entitled to a BLD even under Appellee Industrial's erroneous interpretation of RAB 1992-3.

To satisfy the second prong of the test, Financing Partnership (the transferor entity) must no longer be a taxpayer under the SBTA. As previously mentioned, a taxpayer under the SBTA is "a person liable for a tax, interest, or penalty" under the act.⁶⁷ Financing Partnership is a partnership and a "person" as defined by MCL 208.6. A person becomes a taxpayer under the

⁶³ *Grimes v Dep't of Transportation*, 475 Mich 72, 89; 715 NW2d 275 (2006).

⁶⁴ Plaintiff's Brief in Support of Summary Disposition. Attachment 19.

⁶⁵ Plaintiff's Brief in Support of Summary Disposition. Attachment 19.

⁶⁶ Plaintiff's Brief in Support of Summary Disposition; Attachment 16, C-8000, line 33.

⁶⁷ MCL 208.10(2).

SBTA when it has business activity in Michigan.⁶⁸ During the period in question, Financing Partnership engaged in business activity in Michigan. Financing Partnership owned real property in Michigan in 1998 and filed a 1998 SBT return. Clearly, Financing Partnership itself, recognizes that it was a SBT taxpayer in 1998. During the 1999 tax year, Financing Partnership acquired new Michigan assets and filed a 1999 SBT return. Clearly, Financing Partnership itself recognizes that it was still a SBT taxpayer in 1999. Moreover, the fact that Financing Partnership continued reporting BLD from prior years in 1998, 1999, and 2000 shows that it was still a SBT taxpayer. Only a taxpayer subject to the SBTA would claim a BLD under §23b(h).

Consequently, Treasury submits that, pursuant to MCL 208.23 and the plain language of Treasury's interpretation of that section in its RAB 1992-3, Appellee Industrial is not entitled to the BLD carryover from Financing Partnership. The Court of Claims fully analyzed MCL 208.23 and the effect of the language of RAB 1992-3 and properly applied it to the facts of this case.

⁶⁸ *ANR Pipeline Co*, 266 Mich App 190, 198-199; 699 NW2d 707 (2005), and MCL 208.31(1).

CONCLUSION AND RELIEF SOUGHT

Appellee Industrial is precluded from claiming the business loss deduction. Financing Partnership did not make a liquidating distribution to Appellee Industrial for the latter's partnership interest, Financing Partnership did not completely discontinue operations everywhere, and Financing Partnership was continually a taxpayer under the SBTA.

For these reasons, Treasury respectfully requests that this Honorable Court reverse the Judgment of the Court of Appeals and thereby affirm the Court of Claims judgment.

Respectfully submitted,

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First Industrial L.P., Attachment List

- **Attachment 1:** Stipulation of Facts
- **Attachment 2:** Plaintiff's Response to Defendant's First Request for Production of Documents to Plaintiff.
- **Attachment 3:** Affidavit of John Clancy, Auditor, Michigan Department of Treasury
- **Attachment 4:** Plaintiff's Answers to Defendant's First Interrogatories to Plaintiff
- **Attachment 5:** Plaintiff's Response to Defendant's First Requests for Admissions to Plaintiff
- **Attachment 6:** Plaintiff's Answers to Defendant's Second Interrogatories to Plaintiff
- **Attachment 7:** Industrial's 1998 Single Business Annual Tax Return
- **Attachment 8:** Bill for Taxes Due (Intent to Assess) L924193, dated 09/02/03.
- **Attachment 9:** Decision and Order of Determination, and Informal Conference Recommendation.
- **Attachment 10:** Bill for Taxes Due (Final Assessment) dated 11/02/05.
- **Attachment 11:** Opinion and Order.
- **Attachment 12:** Revenue Administrative Bulletin 1992-3 (RAB 1992-3).
- **Attachment 13:** 1998 Single Business Tax Forms and Instructions.
- **Attachment 14:** Defendant's Answers to Plaintiff's Second Interrogatories
- **Attachment 15:** Defendant's Responses to Plaintiff's First Requests to Admit.
- **Attachment 16:** C-8000
- **Attachment 17:** Affidavit of Scott Munsil, First Industrial Realty Trust, Inc. Chief Accounting Officer, Treasurer and Assistant Secretary.
- **Attachment 18:** *First Industrial, LP v Michigan Department of Treasury*, unpublished per curiam opinion of the Court of Appeals, issued August 18, 2009 (Docket No. 282742).
- **Attachment 19:** Plaintiff's Brief in Support of Summary Disposition