

STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal From the Michigan Court of Appeals, the Honorable Donald S. Owens, Michael
J. Talbot and Patrick M. Meter

Cherryland Electric Cooperative,
Petitioner/Appellee

v

Supreme Court Case No. 145340
COA Docket No. 296829
MTT Docket No. 296021

Blair Township,
Respondent/Appellant.

Cherryland Electric Cooperative,
Petitioner/Appellee

v

Supreme Court Case No. 145341
COA Docket No. 296830
MTT Docket No. 296028

East Bay Township,
Respondent/Appellant

Cherryland Electric Cooperative,
Petitioner/Appellee

v

Supreme Court Case No. 145342
COA Docket No. 296856
MTT Docket No. 296026

Garfield Township,
Respondent/Appellant.

AMICUS CURIAE BRIEF OF MICHIGAN TOWNSHIPS ASSOCIATION
IN SUPPORT OF APPELLANT TOWNSHIPS' APPLICATION FOR LEAVE TO
APPEAL AND MOTION FOR PREEMPTORY REVERSAL

Dated: September 14, 2012

Robert E. Thall (P46421)
BAUCKHAM, SPARKS, LOHRSTORFER,
THALL & SEEBER, P.C.
Attorneys for Amicus Curiae, Michigan
Townships Association
458 W. South Street
Kalamazoo, MI 49007
269-382-4500

TABLE OF CONTENTS

	PAGE
INDEX OF AUTHORITIES.....	iii-iv
STATEMENT OF QUESTION PRESENTED.....	v
STATEMENT OF FACTS	vi
ARGUMENT	
1. THE MICHIGAN COURT OF APPEALS AND MICHIGAN TAX TRIBUNAL MISAPPLIED THE LAW IN DETERMINING THAT THE INCLUSION OF CONTRIBUTION IN AID OF CONSTRUCTION (CIAC) AS A PORTION OF THE VALUATION OF CHERRYLAND ELECTRIC COOPERATIVE’S ELECTRIC SERVICE PERSONAL PROPERTY WAS A MUTUAL MISTAKE OF FACT MADE BY THE ASSESSING OFFICER AND THE TAXPAYER PURSUANT TO MCL 211.53a.	
A. INTRODUCTION.....	1-5
B. STANDARD OF REVIEW.....	5
C. STATUTORY CONSTRUCTION OF MCL 211.53a	6-7
D. DISTINCTION BETWEEN MISTAKES OF FACT AND MISTAKES OF LAW.....	7-9
E. THE MTT MISAPPLIED THE LAW BY RELYING ON THE LOWER COURT’S DECISION IN <u>BRIGGS</u> AND THE COURT OF APPEALS OPINION MISAPPLIES THE SUPREME COURT DECISION IN <u>BRIGGS</u>	9-11
F. THE COURT OF APPEALS AND MTT ERRED IN MISAPPLYING THE <u>FORD</u> MISTAKE OF FACT RULING.....	11-14
G. MUTUAL MISTAKE OF FACT CANNOT BE IMPUTED TO THE TOWNSHIP ASSESSOR IN THIS CASE	14-16
CONCLUSION.....	16

INDEX OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Baker v General Motors</u> , 409 Mich 639; 297 NW2d 387 (1980).....	6
<u>Briggs Tax Service, LLC v Detroit Public Schools, et al</u> , 282 Mich App 29; 761 NW2d 816 (2008).....	3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15
<u>Briggs Tax Service, LLC v Detroit Public Schools, et al</u> , 485 Mich 69; 780 NW2d 753 (2010).....	3
<u>Cherryland v Blair Township, et al</u> , 2012 WL 1697446 (Mich App)	2
<u>City of Detroit v Sledge</u> , 223 Mich App 43; 565 NW2d 690 (1997).....	6
<u>County of Wayne v State Tax Commission</u> , 261 Mich App 174, 682 NW2d 100 (2004).....	4, 11
<u>County of Wayne v State Tax Commission</u> , MTT Docket No. 273674 (2002).....	4, 9, 11, 14
<u>Eltel Associates, LLC v City of Pontiac</u> , 278 Mich App 588; 752 NW2d 492 (2008).....	10
<u>Ford Motor Company v City of Woodhaven</u> , 475 Mich 425; 716 NW2d 247 (2006).....	3, 7, 10, 11, 12, 14
<u>Grebner v Ingham County</u> , 220 Mich App 513; 560 NW2d 351 (1996).....	6
<u>In re: MCI Telecommunications</u> , 460 Mich 396; 596 NW2d 164 (1999).....	6
<u>Montgomery Ward & Co. v Williams</u> , 330 Mich 275; 47 NW2d 607 (1951).....	8
<u>Noll Equipment v Detroit</u> , 49 Mich App 37 (1973)	8, 9
<u>Ontonagon Rural County Electrification Association v Township of Allouex</u> Docket No. 265605	4, 9
<u>Ontonagon County Rural Electrification Association v Sherman Township</u> , Docket No. 265606.....	4, 9

Sherwood v Walker, 66 Mich 568; 33 NW 919 (1887)..... 7, 12

MICHIGAN COMPILED LAWS

PAGE

MCL 205.735..... 2, 13

MCL 205.735(2)..... 10

MCL 205.735a..... 1

MCL 211.30..... 13

MCL 211.53a..... 1, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

MCL 211.53b..... 1

MCL 211.154..... 13

OTHER

Public Act 209 of 1958 8

STATEMENT OF QUESTION PRESENTED

DID THE MICHIGAN COURT OF APPEALS AND MICHIGAN TAX TRIBUNAL MISAPPLY THE LAW IN DETERMINING THAT THE INCLUSION OF CONTRIBUTION IN AID OF CONSTRUCTION (CIAC) AS A PORTION OF THE VALUATION OF CHERRYLAND ELECTRIC COOPERATIVE'S ELECTRIC SERVICE PERSONAL PROPERTY WAS A MUTUAL MISTAKE OF FACT MADE BY THE ASSESSING OFFICER AND THE TAXPAYER UNDER MCL 211.53a.

Michigan Court of Appeals answers: "No".

Tax Tribunal answers: "No".

Appellee Cherryland Electric Cooperative answers: "No".

Appellant Townships answer: "Yes".

Amicus Curiae Michigan Townships Association answers: "Yes".

STATEMENT OF FACTS

Amicus Curiae, Michigan Townships Association, concurs with and hereby adopts the Appellants' Statement of Facts contained in Appellants' Application for Leave to Appeal.

ARGUMENT

1. THE MICHIGAN COURT OF APPEALS AND MICHIGAN TAX TRIBUNAL MISAPPLIED THE LAW IN DETERMINING THAT THE INCLUSION OF CONTRIBUTION IN AID OF CONSTRUCTION (CIAC) AS A PORTION OF THE VALUATION OF CHERRYLAND ELECTRIC COOPERATIVE'S ELECTRIC SERVICE PERSONAL PROPERTY WAS A MUTUAL MISTAKE OF FACT MADE BY THE ASSESSING OFFICER AND THE TAXPAYER UNDER MCL 211.53a.

A. INTRODUCTION

Amicus curiae, Michigan Townships Association, submits this Brief in support of the Appellant Townships' Application for Leave to Appeal and Motion for Preemptory Reversal. Proper resolution of this property tax case is of major importance to Michigan townships, other tax levying entities, and jurisprudence in this state. In order to ensure sound governmental fiscal policy and the ability to rely on tax revenues there are, in general, short time limitations for a taxpayer to challenge property tax assessments and to request refunds.¹ There are some exceptions which allow for longer periods to claim refunds; however, these exceptions are very limited in scope so as to cause minimal harm to the public.² These exceptions have limited impact by being fact based and individualized rather than encompassing corrections for broad policy changes or changes in the law which could otherwise trigger massive refunds across the board. The limited exception under consideration in this case is MCL 211.53a, which provides:

“Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, if suit is commenced within three years from the date of payment, notwithstanding that the payment was not made under protest.” (Emphasis added)

¹ MCL 205.735; MCL 205.735a

² MCL 211.53a and 211.53b

The erroneous Michigan Court of Appeals Opinion (Opinion)³ and the Michigan Tax Tribunal Judgments (MTT Judgments consolidated by the Court of Appeals) eviscerate the limited purpose of MCL 211.53a by creating an improper expansion in what can be characterized as a “mutual mistake of fact”. They improperly opened up “mutual mistakes of fact” to claims stemming from mistakes of law, changes in tax policy, and changes in tax laws. The Opinion and MTT Judgments misapply the law in determining that the inclusion of CIAC, as a portion of the valuation of Cherryland Electric Cooperative’s electric service personal property, was a mistake of fact entitling it to relief under MCL 211.53a. The mistake in this case was not an individualized mistake of fact but, instead, an across the board misapprehension of the law regarding personal property tax on CIAC. For approximately 19 years⁴ Cherryland, and all other rural electric cooperatives, had the right each year to challenge the inclusion of CIAC in the valuation of its electric service personal property through a valuation appeal pursuant to MCL 205.735. Cherryland and all the other rural electric cooperatives slept on their rights. They cannot later transform their misapprehension of the law or the subsequent change in tax policy into a “mutual mistake of fact”. All parties knew CIAC was being included in the personal property tax calculations, there was no factual error in this regard. The Opinion and MTT Judgments create the likelihood for public harm through increased refund liability and the subsequent negative affect on municipal budgets all based on the improperly expanded scope of what could be characterized as a “mutual mistake of fact” under MCL 211.53a. The following is a brief summary of the errors contained in the Opinion and MTT Judgments:

³ Cherryland v Blair Township, et al, 2012 WL 1697446 (Mich App)

⁴ From 1984 until 2003 Township assessors utilized STC forms that required the reporting of CIAC until STC Bulletin No. 13 instructed assessors not to include CIAC for rural electric cooperatives beginning with the 2004 tax year.

1. The MTT in reaching its conclusion erroneously relied on the Michigan Court of Appeals decision of Briggs Tax Service, LLC v Detroit Public Schools, et al, 282 Mich App 29; 761 NW2d 816 (2008), which was reversed on appeal by the Michigan Supreme Court in Briggs Tax Service, LLC v Detroit Public Schools, et al, 485 Mich 69; 780 NW2d 753 (2010). To some degree it is understandable how the MTT could have been misled down a path of error in its reliance on the Court of Appeals Decision in Briggs, as this decision completely undermined the limited scope of relief contained in MCL 211.53a. Briggs directly addressed the issue of a “mutual mistake of fact” pursuant to MCL 211.53a and the Supreme Court struck down the Court of Appeal erroneous expansion in the scope of this limited relief. The MTT Judgments were issued after the Court of Appeals decision in Briggs but before the Supreme Court ruling. The MTT did not analyze the issues under the correct legal framework. The Court of Appeals had the benefit of the Supreme Court ruling in Briggs but then barely analyzed it and failed to properly apply it to the underlying question regarding the validity of including CIAC as personal property subject to tax. The validity of a personal property tax based upon CIAC is on point with Briggs and a finding for a mistake of law.

2. The Opinion and MTT Judgments failed to recognize the critical difference between a mistake of law and a mistake of fact. In the case at bar, the inclusion of CIAC was a misapprehension of the law and the legal right to include it. It was a mistake of law, not a mistake of fact. MCL 211.53a is not applicable to correct mistakes of law.

3. The Opinion and MTT Judgments misapplied the decision from Ford Motor Company v City of Woodhaven, 475 Mich 425; 716 NW2d 247 (2006), which is clearly distinguishable. The mistake in Ford was clearly factual in nature as opposed to the case at bar. The items reported by Ford and accepted by the Assessor were all taxable property, however,

there was a factual error in the amount of taxable items reported. (i.e., report the same piece of personal property twice, etc.). The factual issue was the actual existence of the property. This is far different than the question of whether CIAC should be taxable personal property and any error created by including it.

4. The MTT Judgments erroneously ignored the MTT's earlier conclusion by Tribunal Judge Enyart that the inclusion of CIAC constituted a mistake of law, not a mistake of fact.⁵ Tribunal Judge Enyart correctly found that the inclusion of CIAC was a valuation issue and that the Petitioner did not properly invoke a valuation appeal. This was further upheld in an unpublished Court of Appeals decision.⁶ The Court of Appeals Opinion in the case at bar fails to give these cases due persuasive weight.

5. The Opinion and MTT Judgments failed to properly acknowledge that the Court of Appeals previously addressed as a question of law whether CIAC should be included in determining the personal property valuation of investor-owned utilities' electrical wires.⁷ This case upheld an earlier MTT decision wherein it was determined that CIAC could not legally be included in reaching a value for the calculation of investor-owned utility personal property tax on their electrical lines.⁸ Whether CIAC should be reported was a question of law, not of fact. Any inclusion would be a misapprehension of the law and would address the validity of a tax based upon CIAC.

6. The MTT needlessly bogged itself down with irrelevant information with regard to what certain parties may or may not have believed or agreed to during State Tax Commission

⁵ Ontonagon County Rural Electrification v Sherman Township (2004) MTT Docket No. 296073 and 296098

⁶ Ontonagon Rural County Electrification Association v Township of Allouex and Ontonagon County Rural Electrification Association v Sherman Township, Docket Nos. 265605 and 265606. Leave to appeal to the Michigan Supreme Court was denied. 477 Mich 1055; 728 NW2d 415 (2007).

⁷ County of Wayne v State Tax Commission, 261 Mich App 174, 232; 682 NW2d 100 (2004).

⁸ County of Wayne v State Tax Commission, MTT Docket No. 273674 (2002)

committee meetings where CIAC may or may not have been discussed some 19 years before the State Tax Commission changed its policy to exclude CIAC in 2003. No matter what the parties may have thought following committee meetings, the rural electric utilities, the State Tax Commission and local assessors all understood that CIAC was being reported and included in value. The inclusion of CIAC was, if anything, a misapprehension of law, not a factual mistake. Additionally any mistake from these meetings and imposed by the State Tax Commission cannot be imputed to township assessors.

7. The Opinion and MTT Judgments in this case erred by imputing a mutual mistake to the township assessor for including CIAC in the valuation of the electric service personal property pursuant to the STC reporting forms. If such a mistake in the STC form was made, it was done so by the STC not the township assessor. The assessor performed their statutory duties as required. Since use of the STC form and reporting of CIAC was not a mistake of the township assessor or taxpayer, under no circumstances could MCL 211.53a be invoked. Inclusion of CIAC was still a valuation issue between the parties.

B. STANDARD OF REVIEW

The Michigan Supreme Court in Briggs expressed the standard of review in this type of case as follows:

“The standard of review of Tax Tribunal cases is multifaceted. If fraud is not claimed, this Court reviews the Tax Tribunal’s decision for misapplication of the law or adoption of a wrong principle. We deem the Tax Tribunal’s factual findings conclusive if they are supported by “competent, material, and substantial evidence on the whole record.” But when statutory interpretation is involved, this Court reviews the Tax Tribunal’s decision de novo.” (footnotes omitted).⁹

⁹ Briggs, supra, at 75.

C. **STATUTORY CONSTRUCTION OF MCL 211.53a**

Questions of statutory interpretation are questions of law.¹⁰ The primary goal of statutory interpretation is to give effect to the intent of the legislature.¹¹ The first step in that determination is to review the language of the statute itself.¹² If a statute is unambiguous on its face, the legislature will be presumed to have intended the meaning expressed and judicial construction is neither required nor permissible.¹³ The legislature is presumed to have intended the meaning as expressed and courts should presume that every word has some meaning and give effect to every word, phrase and clause.¹⁴ If possible, every word of a statute should be given meaning, and no word shall be treated as a surplusage or rendered nugatory.¹⁵

“All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.”¹⁶

Understanding the applicability of MCL 211.53a is the focal point of this case and requires application of the above-referenced rules of statutory construction. Under specific consideration in this case is the scope of a “mutual mistake of fact made by the assessing officer and the taxpayer”.¹⁷

In Briggs, the Supreme Court stated that:

¹⁰ In re: MCI Telecommunications, 460 Mich 396, at 413; 596 NW2d 164 (1999).

¹¹ In re: MCI Telecommunications, supra, at 411.

¹² In re: MCI Telecommunications, supra, at 411.

¹³ In re: MCI Telecommunications, supra, at 411.

¹⁴ City of Detroit v Sledge, 223 Mich App 43; 565 NW2d 690 (1997); Grebner v Ingham County, 220 Mich App 513; 560 NW2d 351 (1996).

¹⁵ Baker v General Motors, 409 Mich 639; 297 NW2d 387 (1980).

¹⁶ Briggs, supra, at 77, citing MCL 8.3a.

¹⁷ MCL 211.53a.

“Here, the phrase ‘mutual mistake of fact’ is a technical term that has acquired a particular meaning under the law.”¹⁸

The Supreme Court in Briggs further noted with regard to its previous holding in Ford, that:

“We considered the common-law meaning of ‘mutual mistake of fact’. We referred to the Black’s Law Dictionary definition of ‘mistake,’ ‘mutual mistake,’ and ‘mistake of fact,’ as well as the seminal case of Sherwood v Walker. We held that a ‘mutual mistake of fact’ is ‘an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction.’ ” (footnotes omitted)¹⁹

It is apparent that not just any mistake will trigger MCL 211.53a. As will be discussed, when the case at bar is applied to the above, it is clear that the inclusion of CIAC was not a “mutual mistake of fact” between the assessor and the taxpayer as required for application of MCL 211.53a.

D. **DISTINCTION BETWEEN MISTAKES OF FACT AND MISTAKES OF LAW**

Rather than restating in full the Appellant Townships’ arguments regarding the conceptual distinctions between mistake of law and mistake of fact contained in their Application for Leave to Appeal, Amicus Curiae concurs with said arguments and supplements them.

The distinction between “mutual mistakes of fact” as required under MCL 211.53a and mistakes of law is critical to a proper determination in this case. As previously indicated, the Opinion and MTT Judgments fail to properly delineate this critical distinction which clearly supports the argument that the inclusion of CIAC in the electric service personal property valuation calculation was a mistake of law. Further, there is no case law which supports the concept that MCL 211.53a has somehow extended its reach over mistakes of law. In fact, the

¹⁸ Briggs, supra, at 77.

¹⁹ Briggs, supra, at 77.

Supreme Court in Briggs indicated that this distinction still exists.²⁰ In Briggs the court analyzed whether the collection of an unauthorized tax was a mistake of law or a mistake of fact. In Briggs the Supreme Court cited a number of cases regarding mistakes of law and agreed with their reasoning “that a mistake about the validity of a tax constitutes a mistake of law”.²¹ The mistake regarding the inclusion of CIAC in the assessed value was not a mistake with regard to the fact that it was included (all parties knew it was included and what it was) but rather, a mistake as to the validity of a tax on CIAC. This constitutes a mistake of law.

Although not a tax case, the Michigan Supreme Court in Montgomery Ward & Co v Williams, 330 Mich 275; 47 NW2d 607 (1951) addressed the black letter rule regarding mistakes of law. In Montgomery Ward the court stated that:

“In 53 ALR 949, it is said: ‘the rule is well-settled that, where money has been voluntarily paid with full knowledge of the facts, it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations of the person paying’”.²²

It is quite clear that MCL 211.53a, which was enacted in 1958,²³ was intended to address mistakes of fact and not the above-referenced mistakes or misapprehensions of law. The language in MCL 211.53a does not include simply mistakes but instead specifically only “mistakes of fact”. In the case at bar, payment was made by Cherryland on its personal property assessments with full knowledge that CIAC was included and the only mistake made was a misapprehension of the legal rights and obligations with regard to the validity of its inclusion.

In Noll Equipment v Detroit, 49 Mich App 37, the court addressed a taxpayer’s claim for relief under MCL 211.53a. The taxpayer claimed that its imported steel was immune from local property taxation and that a “mutual mistake of fact” occurred in their assessment and payment

²⁰ Briggs at 81.

²¹ Briggs at 83.

²² Montgomery Ward at 285.

²³ Public Act 209 of 1958.

of the tax on it. The Court of Appeals in Noll determined that the imported steel was immune from taxation and that imposition of the tax was a mistake of law, not fact. The court in Noll relied on Michigan case law and statutory analysis in reaching its conclusion that the mistake was of law and that MCL 211.53a was not applicable. Similarly, the mistake made by Cherryland in this case is one of law, not of fact. Cherryland had the opportunity to challenge the illegal inclusion of CIAC under alternative remedies. The inclusion of CIAC is similar in nature to the inclusion of the property in Noll as in both cases the property should not have been included in the assessed value as a matter of law and the matters should have been pursued as valuation disputes.²⁴

E. **THE MTT MISAPPLIED THE LAW BY RELYING ON THE LOWER COURT'S DECISION IN BRIGGS AND THE COURT OF APPEALS OPINION MISAPPLIES THE SUPREME COURT DECISION IN BRIGGS.**

The MTT Judgments reference subsequently reversed case law as a basis for their conclusion. The MTT in reaching its erroneous conclusion took an ill-advised leap of faith in citing its reliance on the Michigan Court of Appeals decision in Briggs while it was under appeal to the Michigan Supreme Court. After issuance of the MTT Judgments, the Michigan Supreme Court properly reversed the Court of Appeals decision in Briggs. The Court of Appeals decision in Briggs completely undermined the limitations placed in MCL 211.53a and opened the door to erroneous judgments, as in the case at bar. The Court of Appeals in Briggs held that the authorization of an expired millage, originating out of a legal mistake of a Detroit Public School official, and imputed by agency principles to the Detroit assessor constituted a “mutual mistake of fact” within the meaning of MCL 211.53a. This conclusion by the Court of Appeals in Briggs essentially destroyed the distinction between mistakes of law and mistakes of fact. In turning a

²⁴ See County of Wayne cases and Ontonagon, cases supra.

mistake regarding the validity of a tax into a mistake of fact, the Court of Appeals in Briggs opened the door to argument that all mistakes are of fact, even when they involve a misapprehension of law. Fortunately, the Supreme Court shut this door and struck down the Court of Appeals erroneous expansion of a “mutual mistake of fact”. The Supreme Court in Briggs found the Court of Appeals reliance on Ford and Eltel misplaced²⁵. Interestingly, the MTT Judgments rely on all three of these inapplicable cases. The Supreme Court in Briggs concluded that:

“We hold that DPS’s mistake of levying an unauthorized 18 – mill property tax for tax years 2002, 2003 and 2004, does not constitute a ‘mutual mistake of fact made by the assessing officer and the taxpayer’ within the meaning of MCL 211.53a. Accordingly, the Tax Tribunal correctly ruled that the Petitioner’s claim is subject to the 30-day limitations of former MCL 205.735(2) and that the 3-year limitations period of MCL 211.53a does not apply.”²⁶

The Supreme Court in Briggs in reaching its conclusion cited cases indicating that a mistake about the validity of a tax constituted a mistake of law, not a mistake of fact.²⁷ In the case at bar, the MTT was relying on the Court of Appeal’s decision in Briggs and did not have the benefit of the Supreme Court’s reversal to assist it in reaching a proper conclusion. In the case at bar, the Court of Appeals had the benefit of considering the Supreme Court’s decision in Briggs, however, it failed to provide any meaningful analysis. Ultimately, the Opinion misapplies Briggs in finding its inapplicability to the relevant facts.

The Opinion states that:

“The Townships argue that the STC’s requirement that the REAs report CIAC was a matter of law and any mistake in that regard was a mistake of law. This argument, however, must fail as this case does not involve the ‘collection of an unauthorized tax.’ Rather, the tax here was authorized, but the form used to compute the tax contained an error.” (Footnote citation omitted)

²⁵ Briggs at 83-84.

²⁶ Briggs at 85

²⁷ Briggs at 83

This analysis is incorrect because a personal property tax based upon CIAC is unlawful and not authorized by law.²⁸ County of Wayne was even cited in footnote 11 of the Opinion but its statement that CIAC is not property was given no analysis. Inclusion of CIAC involved a misapprehension of law, a mistake of law, not just a factual issue. The Court of Appeals Opinion is incorrect as the personal property tax on CIAC was apparently unlawful. There is no factual issue. This is clearly on point with the distinctions drawn in Briggs. For 19 years Cherryland and others failed to properly challenge the lawfulness of including CIAC. While they could have availed themselves of appropriate remedies, MCL 211.53a and its 3 years limitation period does not apply. Any mistake regarding whether CIAC should have been included in the valuation of Cherryland's electric service personal property is clearly a mistake of law as its inclusion was not authorized by law.²⁹

F. **THE COURT OF APPEALS AND MTT ERRED BY MISAPPLYING THE FORD MISTAKE OF FACT RULING.**

The Court of Appeals Opinion and MTT Judgments erroneously cite the Ford case in its conclusion that the inclusion of CIAC in valuation of Cherryland's utility lines as provided on the STC forms was a "mutual mistake of fact" under MCL 211.53a. The Supreme Court in Ford determined that a "mutual mistake of fact" is "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction".³⁰ There is nothing in this determination that should have lead to the belief that the "mistake" could be anything but purely fact based. In the case at bar, any reliance on Ford is misplaced. Ford dealt with purely factual errors and as indicated by the Supreme Court in Briggs:

²⁸ See County of Wayne, supra at 232.

²⁹ See County of Wayne and Ontonagon cases, supra.

³⁰ Ford at 442.

“Indeed, in reaching our decision in Ford, we did not consider or discuss the distinction between a mutual mistake of fact and a mistake of law.”³¹

In Ford the court addressed errors that were purely factual without any indication that the errors were caused by erroneous conclusions of law. Ford filed personal property statements containing factual mistakes about the amount of taxable property. The taxing units involved accepted the personal property statements as accurate and calculated Ford’s tax on that basis. Ford later discovered the mistakes and petitioned for refunds as “mutual mistakes of fact” under MCL 211.53a. In Ford some of the mistakes that were on their statements included double reporting of assets, including assets that had been sold, and the inclusion of leased assets. These assets were included on their personal property statements by mistake and would not have been included if Ford or the assessor had realized the factual circumstances. These mistakenly reported assets were not reported due to erroneous conclusions of law. The mistakes were individualized fact based errors.

The case at bar is completely opposite in nature to the Ford case. Unlike Ford, the parties in this case knew CIAC was being reported and used for valuation. Any mistake in reporting CIAC stemmed from a misapprehension of legal rights and obligations. It was a question of law, not fact, as to whether CIAC was properly reported as part of Cherryland’s assessed assets.

Further, this policy issue (CIAC inclusion) was broad-based covering all rural electric providers and was not just an individualized factual error on Cherryland’s part. Mistakes of fact tend to be straightforward as demonstrated in the case of Sherwood v Walker, 66 Mich 568, 33 NW 919 (1887), which was relied on by the court in Ford. In Sherwood the purely factual mistake dealt with whether a cow was barren. Mistakes of fact should not have to involve construction of any laws. These cases clearly demonstrate that the reporting of CIAC was a mistake of law, not fact.

³¹ Briggs at 84.

The appropriate remedy would have been a valuation appeal not a challenge under MCL 211.53a.

The MTT previously addressed the exact same subject matter and found that the inclusion of CIAC was “a mistake of law which is not correctable by the Tribunal as Petitioner has not properly invoked a valuation appeal.”³² The MTT further found that “there is no (i) incorrectly reported personal property, (ii) mutual mistake of fact, or (iii) clerical error. Petitioner did not appeal the valuation from the March Board of Review, and therefore, the Tribunal has no jurisdiction”.³³ In the unpublished Ontonagon Court of Appeals decision it was determined that inclusion of CIAC financed property in determining true cash value attributable to transmission and distribution of property for assessment purposes is a valuation question.³⁴

The Court of Appeals indicated that:

“The Association’s challenge revolves around the State Tax Commission’s requirement that contributions in aid of construction be valued in the Association’s personal property statements filed with local assessors. This is a valuation question because it involves whether the contributions the Association receives increase the value of its transmission and distribution property. The Association’s challenge was, therefore, improper under MCL 211.154. It should have been pursued under MCL 211.30 and MCL 205.735. Accordingly, the Association’s failure to challenge the assessment before Allouez’s and Sherman’s Board of Review deprived the Tax Tribunal jurisdiction over this dispute.”³⁵

It should be noted that these cases were reviewing the applicability of MCL 211.154, not MCL 211.53a. Although these statutes involve different exceptions to make claims, the subject matter was the same as this case and the rulings provide relevant legal determinations. The Court of Appeals was incorrect in its Opinion by dismissing the applicability of these cases.

³² Ontonagon MTT case at 4

³³ Ontonagon MTT case at 4

³⁴ Court of Appeals Ontonagon case, Exhibit 4 of Appellants’ Court of Appeals Appendix.

³⁵ Court of Appeals Ontonagon case, page 4 of 6.

The County of Wayne cases also provide insight into the depth of the issue regarding whether CIAC should be reported in determining personal property valuations for electrical utilities. The issues were far beyond a purely factual mistake but rather involved complex questions of law regarding the valuation of investor-owned utility assets. The Court of Appeals in County of Wayne addressed as a question of law whether CIAC should be included in determining the personal property valuation of investor-owned utilities. The Court of Appeals upheld an earlier Tax Tribunal decision wherein it was determined that CIAC could not be lawfully included in the valuation for investor-owned utility personal property tax on their electrical lines. This determination is applicable to the case at bar. Inclusion of CIAC clearly involves a misapprehension of the law and is completely dissimilar to the factual mistakes referenced in Ford.

G. **MUTUAL MISTAKE OF FACT CANNOT BE IMPUTED TO THE TOWNSHIP ASSESSOR IN THIS CASE**

MCL 211.53a clearly requires that the “mutual mistake of fact” must be made by the assessing officer and the taxpayer. Therefore, in order to invoke MCL 211.53a one of the requirements would be that the township assessor must have made a mistake in the performance of his duties. Similar to the assessor in Briggs, the assessor in this case performed the statutory duties as required with no allegation otherwise.³⁶ In the case at bar there is no mutual mistake of fact between the township assessor and taxpayer under MCL 211.53a. The MTT Judgments improperly concluded:

“that the inclusion of the CIAC-funded assets on the STC forms was an error in both arriving at a valuation and in uniformly applying the law to all utilities. The mutual mistake of fact committed by both parties is the assumption that the form was correct.”³⁷

³⁶ Briggs at 78, 79.

³⁷ MTT Judgment Appellant’s Court of Appeals Appendix, Exhibit 19, page 14

The Court of Appeals carried this forward error and stated in the Opinion that:

“The Townships also asserts that both the STC and the Michigan Electric Cooperative Association (“MECA”) were aware that REAs were to report CIAC when reporting personal property for tax purposes. While the STC and MECA may have been aware that the personal property reporting form contains CIAC, any awareness does not change that Cherryland and the townships’ assessors shared and relied on the erroneous belief that the 1984 form was correct. Thus, this argument also must fail.” (Footnote citation omitted)

No law is cited to allow an error in the STC form to be imputed to the local assessor. In Briggs the Supreme Court did not allow the mistake in levying the invalid tax by the Detroit Public Schools to be imputed to the local assessor on the assessor’s assumption that the authorization was correct. Similarly, an error by the STC cannot be imputed down to the township assessor just because of the township assessor’s assumption that the STC is correct. All of the background information as to what was or wasn’t discussed or agreed to in STC committee meetings in 1984 is irrelevant as any mistake from these STC meetings certainly cannot be imputed to a local assessor 19 years later.

If the assessor was bound to include CIAC because of the form, then the error cannot be imputed. It would have been beyond the control of the assessor. This is the same as Briggs.

Alternatively, if the assessor was not bound to include CIAC by the STC form, then whether the form is correct is irrelevant. There would be no factual mistake by an assessor in adding CIAC if the assessor intentionally included it in the valuation pursuant to their assessing authority. They could have just as easily chosen not to include CIAC even though reported. If the tax payer disagreed with the assessor’s inclusion of CIAC, they could have filed a valuation appeal.

As previously indicated, the assessor made no mistake in performing statutory duties as required. The plain language of MCL 211.53a requires that the mistake be mutual and be made

by the assessor and taxpayer. Since this is not the case, MCL 211.53a does not provide a basis for relief.

CONCLUSION

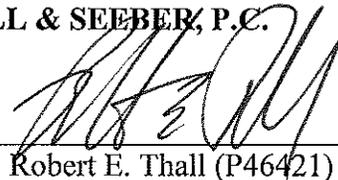
Based upon the foregoing arguments in addition to the Appellants' arguments, it is clear that this case does not involve a "mutual mistake of fact made by the assessing officer and the taxpayer" within the meaning of MCL 211.53a. The inclusion of CIAC as a portion of the valuation of Cherryland Electric Cooperative's electric service personal property as reported on the STC forms clearly involved a mistake or misapprehension of law as opposed to a "mutual mistake of fact". To find otherwise would eviscerate the limited purpose of MCL 211.53a and a Pandora's box would be opened to allow numerous future claims under MCL 211.53a stemming from mistakes of law, changes in tax policy and changes in law. We respectfully request that leave be granted by this honorable court and that the Townships' Motion for Preemptory Reversal be granted. Otherwise, we respectfully request that leave be granted by this honorable court and the parties allowed to further brief this matter.

Dated: September 14, 2012

Respectfully submitted,

**BAUCKHAM, SPARKS, LOHRSTORFER,
THALL & SEEBER, P.C.**

By: _____



Robert E. Thall (P46421)

458 West South Street
Kalamazoo, MI 49007
(269) 382-4500

e-mail: thall@michigantownshiplaw.com