

STATE OF MICHIGAN

MICHIGAN SUPREME COURT

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

**CHERRYLAND ELECTRIC COOPERATIVE,**  
Petitioner-Appellee,

v

**BLAIR TOWNSHIP,**  
Respondent-Appellant,

Supreme Court Case No. *Opn 5-15-12*  
COA Docket No. 296829  
Lower Tribunal/MTT Docket # 296021  
*05-*

**CHERRYLAND ELECTRIC COOPERATIVE,**  
Petitioner-Appellee,

v

**EAST BAY TOWNSHIP,**  
Respondent-Appellant,

Supreme Court Case No.  
COA Docket No. 296830  
Lower Tribunal/MTT Docket # 296028  
*05-*

**CHERRYLAND ELECTRIC COOPERATIVE,**  
Petitioner-Appellee,

v

**GARFIELD TOWNSHIP,**  
Respondent-Appellant.

Supreme Court Case No.  
COA Docket No. 296856  
Lower Tribunal/MTT Docket # 296026  
*05-*

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**RESPONDENTS/APPELLANTS' APPLICATION FOR LEAVE TO APPEAL FROM  
THE MAY 15, 2012 OPINION OF THE MICHIGAN COURT OF APPEALS**

**FILED**

Date: June 21, 2012

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**TABLE OF CONTENTS**

	<b><u>Page</u></b> <b><u>No.</u></b>
INDEX OF AUTHORITIES.....	iv
DATE AND NATURE OF OPINION BEING APPEALED FROM AND STATEMENT OF THE BASIS OF MICHIGAN SUPREME COURT JURISDICTION.....	vi
STATEMENT OF QUESTIONS INVOLVED.....	vii
QUESTION NO. 1:	
DID THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN TAX TRIBUNAL ERR BY NOT CHARACTERIZING THE PETITIONER APPELLEE’S CLAIM FOR A PROPERTY TAX REFUND UNDER MCL 211.53a AS A CLAIM ABOUT THE INVALIDITY, IRREGULARITY, OR UNAUTHORIZED NATURE OF A TAX, WHICH IS A MISTAKE OF LAW, AS RECENTLY RE-STATEd BY THE MICHIGAN SUPREME COURT IN <i>BRIGGS TAX SERVICE, LLC V DETROIT PUBLIC SCHOOLS</i> , 485 MICH 69; NW2d 753 (2010)?	
.....	vii
INTRODUCTION AND SUMMARY OF GROUNDS FOR THE APPLICATION .....	1
1. The issue has significant public interest as it has substantial impacts on property tax policy affecting the Michigan State Tax Commission and local taxing entities.....	1
2. The issue involves legal principals of major significance to the stat’s jurisprudence .....	2
STATEMENT OF FACTS .....	3
BACKGROUND .....	3
A. Personal Property Tax Reporting by Electric Utilities.....	3
B. 1984 Committee Bulletin No. 1 and Contribution in Aid of Construction Reporting.....	3
C. Change in CIAC Reporting by Cooperatives.....	5
1. Bulletin No. 13 Extends CIAC Exclusion to the REAs.....	6
D. The REAs Challenge the Requisite for CIAC Reporting as a Result of the Tribunal Decision.....	7
1. Cherryland's Cases Held in Abeyance .....	7

	<u>Page No.</u>
2. Cherryland's Cases are Withdrawn from Abeyance/The Tribunal's Request for Further Information .....	8
a. Cherryland's Response to the Tribunal's Request for Information .....	8
b. The Townships' Response to the Order Requiring Information .....	11
E. The Tribunal Rules in Favor of Cherryland .....	12
1. The Green Lake Township Judgment in Favor of Cherryland .....	12
2. The Motion for Reconsideration with Respect to the Green Lake Township Judgment .....	13
3. The Tribunal's Denial of the Motion for Reconsideration and Issuance of New Judgments .....	13
4. Michigan Court of Appeals Affirmed the Michigan Tax Tribunal Judgments .....	14
ARGUMENT .....	15
I. The Michigan Court of Appeals and the Michigan Tax Tribunal Erred by Not Characterizing the Petitioner Appellee's Claim for a Property Tax Refund as a Claim About the Invalidity, Irregularity, or Unauthorized Nature of a Tax, Which is a Mistake of Law as Recently Re-Stated by the Michigan Supreme Court in <i>Briggs Tax Service, LLC v Detroit Public Schools</i> , 485 Mich 69; NW2d 753 (2010) .....	15
Standard of Review .....	15
A. The Origins of MCL 211.53a and the Conceptual Distinctions Between Mistakes of Law and Mistakes of Fact, Recently Restated by <i>Briggs</i> .....	16
B. The Facts and Issues in <i>Cherryland</i> are Directly Analogous to Those in <i>Briggs</i> .....	20
1. There was no Evidence that the State Tax Commission Property Tax Form Contained an Error. Even if the Form did Contain an Error, that Would Constitute and Irregularity in the Tax, not a Mutual Mistake of Fact .....	21

	<u>Page</u> <u>No.</u>
2. The Township Assessors Did Not Make a Mistake with Respect to CIAC Personal Property Tax Reporting for Purposes of MCL 211.53a.....	22
C. The Court of Appeals Erred in its Reliance on <i>Ford Motor Company v</i> <i>City of Woodburn</i> , rather than <i>Briggs</i> .....	24
CONCLUSION AND RELIEF REQUESTED .....	26

**INDEX OF AUTHORITIES**

<b><u>Cases:</u></b>	<b><u>Page No.</u></b>
<i>Briggs Tax Service LLC v Detroit Public Schools, Detroit Board of Education, City of Detroit and Wayne County Treasurer</i> 282 Mich App 29; 761 NW2d 816 (2008).....	15, 16, 19
<i>Briggs Tax Service LLC v Detroit Public Schools, Detroit Board of Education, City of Detroit and Wayne County Treasurer</i> 485 Mich 69; NW2d 753 (2010), .....	i, ii, vii, 1, 2, 15, 16, 19, 20, 23, 24, 26
<i>Cherryland Electric Cooperative v Green Lake Township</i> Michigan Tax Tribunal Docket No. 296025.....	ii, 1, 2, 12, 18, 20, 25, 26
<i>City of Detroit v Kenwal Products</i> 14 Mich App 657, 549, 662; 165 NW2d 875 (1968).....	18, 19
<i>Consumers Power Company v County of Muskegon</i> 346 Mich 243; 78 NW2d 223 (1956).....	16, 24, 25, 26
<i>County of Wayne v Michigan State Tax Commission</i> Michigan Tax Tribunal Docket No. 273674.....	6, 7, 23
<i>County of Wayne v Michigan State Tax Commission</i> 261 Mich App 174; 682 NW2d 100 (2004).....	6
<i>Eltel Associates v City of Pontiac</i> 278 Mich App 588; 752 NW2d 492 (2008).....	24, 25, 26
<i>Ford Motor Company v City of Woodhaven</i> 475 Mich 425; 716 NW2 247 (2006).....	iii, 24, 25, 26
<i>Gould v Board of County Commissioners of Hennepin County</i> 76 Minn 379, 381 (79 NW 303, 530).....	17
<i>Ontonagon Rural County Electrification Association v Sherman Township</i> Michigan Tax Tribunal Docket No. 296073.....	7, 8, 9
<i>Ontonagon Rural County Electrification Association v Township of Allouex</i> Michigan Tax Tribunal Docket No. 296098.....	7, 8, 9

	<u>Page No.</u>
<i>Ontonagon Rural County Electrification Association v Township of Allouex</i> Michigan Court of Appeals Docket No. 265605 .....	8
<i>Ontonagon Rural County Electrification Association v Sherman Township</i> Michigan Court of Appeals Docket No. 265606 .....	8
<i>Ontonagon Rural County Electrification Association v Sherman Township and Township of Allouex</i> 477 Mich 1055; 728 NW2d 415 (2007).....	8
<i>Spoon-Shacket Company Inc v County of Oakland</i> 356 Mich 151; 97 NW2d 25 (1959).....	25, 26
<i>Upper Peninsula Generating Company v City of Marquette</i> 18 Mich App 516, 517; 171 NW2d 572 (1969).....	18, 19
<i>Wolverine Steel Company v City of Detroit</i> 45 Mich App 671; 207 NW2d 194 (1973).....	12, 18, 19, 20, 24

**Court Rules:**

MCR 7.215(C) .....	9
MCR 7.302.....	vi

**Statutes:**

MCL 209.104 .....	22
MCL 211.1 .....	3
MCL 211.10e .....	22
MCL 211.19(2) .....	22, 23
MCL 211.19(5) .....	23
MCL 211.53a.....	i, ii, vii, 1, 2, 7, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25
MCL 211.154.....	7, 9

**DATE AND NATURE OF OPINION BEING APPEALED FROM AND  
STATEMENT OF THE BASIS OF MICHIGAN SUPREME COURT  
JURISDICTION**

This Application for Leave to Appeal is being brought pursuant to MCR 7.302 *et. seq.* The Respondents-Appellants Blair Township, East Bay Township and Garfield Township seek leave to appeal from, and peremptory reversal of, the Michigan Court of Appeals consolidated Opinion, dated May 15, 2012, attached as *Appendix 1*.

This Application is being filed within 42 days of the Michigan Court of Appeals Opinion, dated May 15, 2012.

The Respondents-Appellants correspondingly seek reversal of the underlying Michigan Tax Tribunal Final Opinions and Judgments, dated February 16, 2010, *Appendix 2.A-2.C*, affirmed by the Court of Appeals' May 15, 2012 Opinion.

**STATEMENT OF QUESTION INVOLVED**

**QUESTION NO. 1:**

DID THE MICHIGAN COURT OF APPEALS AND THE MICHIGAN TAX TRIBUNAL ERR BY NOT CHARACTERIZING THE PETITIONER APPELLEE'S CLAIM FOR A PROPERTY TAX REFUND UNDER MCL 211.53a AS A CLAIM ABOUT THE INVALIDITY, IRREGULARITY, OR UNAUTHORIZED NATURE OF A TAX, WHICH IS A MISTAKE OF LAW, AS RECENTLY RE-STATED BY THE MICHIGAN SUPREME COURT IN *BRIGGS TAX SERVICE, LLC V DETROIT PUBLIC SCHOOLS*, 485 MICH 69; NW2d 753 (2010)?

Respondents/Appellants answered:            Yes.

Petitioner/Appellee answered:                No.

The Michigan Court of Appeals answered:    No.

The Michigan Tax Tribunal answered:        No.

## **INTRODUCTION AND SUMMARY OF GROUNDS FOR THE APPLICATION**

This case involves a consolidated appeal of three Judgments of the Michigan Tax Tribunal ("Tribunal" or "MTT") against three respective townships in northwest Michigan. The MTT ruled that the Petitioner-Appellee Cherryland Electric Cooperative ("Cherryland") is entitled to a refund of personal property taxes paid on a portion of its electric line, pursuant to MCL 211.53a, which allows a taxpayer to recover taxes paid as a result of a mutual mistake of fact between the taxpayer and the local assessor.<sup>1</sup> The Michigan Court of Appeals (or "COA") affirmed the MTT Judgments in a consolidated Opinion, dated May 15, 2012. ("*Cherryland*")

The MTT's ruling conflicts squarely with the Michigan Supreme Court's recent decision, *Briggs Tax Service LLC v Detroit Public Schools, Detroit Board of Education, City of Detroit and Wayne County Treasurer*, 485 Mich 67; 780 NW2d 753 (2010). The Supreme Court in *Briggs* restated the rule that an irregularity in a tax itself constitutes a "mistake of law," for which a taxpayer cannot recover a refund under MCL 211.53a. *Briggs* further concluded that a mistake of fact must be shared by the assessor and the taxpayer, and cannot stem from a mistake or irregularity in a tax law that a local assessor is required to follow<sup>2</sup>. The claims in *Cherryland* clearly alleged a mistake of state tax law, and not a mutual mistake of fact between the assessor and taxpayer.

1. **The issue has significant public interest as it has substantial impacts on property tax policy affecting the Michigan State Tax Commission and local taxing entities.**

The Opinion of the COA, and the underlying Judgments of the MTT will cause unjustified and substantial refunds of personal property taxes by the three Respondent/Appellant townships (or "Townships") and the other taxing entities, such as Grand Traverse County, for

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<sup>1</sup> A typical mistake of fact occurs where, for example, taxes are assessed on property that does not actually exist.

<sup>2</sup> *Briggs* was a unanimous decision of the Michigan Supreme Court.

which the townships assess and collect personal property taxes. The MTT Judgments and COA Opinion, left standing, will encourage unjustified retroactive property tax refund requests against cities, townships and other taxing entities, statewide, any time there is a change in State Tax Commission tax policy or other change in property tax law. The public interest is underscored by the fact that the Michigan Townships Association (“MTA”) filed an Amicus Curiae Brief in support of the three appellant Townships at the COA.

2. **The issue involves legal principals of major significance to the state’s jurisprudence.**

The COA Opinion is significant because it is a brazen, blatant and unjustified departure from *Briggs*. Even though it is an unpublished case, left standing, it creates statewide confusion for property tax jurisprudence with respect to MCL 211.53a. Left standing, it signals that the Court of Appeals can ignore clear and binding precedent from the Michigan Supreme Court, unscathed.

Because *Cherryland’s* departure from *Briggs* is so self-evident, it demands peremptory reversal as the most appropriate and efficient remedy.

For the following reasons, the Townships request this Court grant its Application for Leave and grant peremptory reversal of the Michigan Court of Appeals’ Opinion, and of the underlying MTT Judgments.

## STATEMENT OF FACTS

### BACKGROUND

#### **A. Personal Property Tax Reporting by Electric Utilities.**

There are two types of electric utilities in Michigan generally. First, there are Investor-Owned Utilities (or "IOU") located generally in more heavily populated areas, and there are Rural Electric Cooperatives or Associations (or "REA") located in more rural areas. See Affidavit of Former State Tax Commission Official Leslie V. Anderson, p 2 and attachments, *Appendix 3*.

Both the IOUs and the REAs possess property consisting of transmission and distribution wires, poles, substations, etc. These electric wires and other equipment are considered personal property, and are subject to ad valorem property tax, under the General Property Tax Act at MCL 211.1, *et seq.*

Because of the complexity of reporting and assessing this type of utility personal property, and the need for uniformity, the Michigan State Tax Commission (or "STC") has developed standard guidelines and forms for local assessors to apply. Among the STC forms are those prepared specifically for personal property tax reporting by the electric utilities. See *Appendix 3.E*.

#### **B. 1984 Committee Bulletin No. 1 and Contribution in Aid of Construction Reporting.**

A survey conducted from 1980-1982 implied the STC personal property reporting schedules were over-valuing the REAs' total plant as compared to REA book values. Because of these discrepancies, the STC and the Michigan Electric Cooperative Association ("MECA") formed a Committee in 1983 to modify reporting procedures for REAs' personal property. The Committee completed its work in 1984. See Thomas Hanna, Chairman, MECA Tax Committee,

letter, dated December 8, 1983, attached to the *Respondent-Appellants' Appendix at the Court of Appeals, Exhibit 17. ("COA Ex")*.

Along with addressing the discrepancy within the STC's schedules, the Committee also considered the application of a System Economic Factor ("SEF") that addressed discrepancies between the earning power of transmission lines owned by REAs located in different areas. For example, lines owned by the more remotely located REAs had less earning power than REAs located in areas that were less remote. The SEF formula also sought to obtain uniformity between REAs and IOUs in the valuation process. See Anderson Affidavit, p 2, *Appendix 3*.

At the conclusion of the Committee process between MECA and the STC, the STC released STC Bulletin No. 1, dated January 11, 1984 (see *Appendix 3.B*). Following the issuance of Bulletin No. 1, the Utilities Valuation Section ("UVS") of the STC staff worked on a personal property tax reporting form for the REAs. The STC approved this form and identified it as L-4175D ("Form L-4175D") at a meeting on June 14, 1984. See STC Minutes, June 14, 1984, attached as *Appendix 3.D*.

Included among the items to be reported on Form L-4175D, released in 1984, was Contribution in Aid of Construction ("CIAC"). CIAC represents the cost necessary to construct an electric service line to a building, for example, from the main REA transmission line under circumstances where there is a significant distance between the transmission line and the building. Electric utility standards require the property owner to pay the cost of extending the line, rather than the utility, so that the cost is not spread among other users of the utility. See Anderson Affidavit, *Appendix 3*.

Leslie V. Anderson was a former official at the STC and served as the Manager of the Utilities Valuation Section ("UVS") of the STC from approximately 1982 until Les Anderson retired from the STC in 1994. On July 6, 1984, Anderson distributed Form L-4175D for use.

See Form L-4175D attached to Anderson's July 6, 1984 cover letter, *Appendix 3.E*. Anderson explained that REAs were required to report CIAC on Schedule 1, Calculation of Percent Condition Factor under column (H) titled "Non-Refundable Contributions." See Anderson Affidavit, p 4, *Appendix 3*.

Anderson emphasized that STC and MECA officials involved in the process that led up to STC Bulletin No. 1 and the new forms, understood that REAs would be required to report CIAC. Mr. Anderson's Affidavit, *Appendix 3*, p 3, stated the following:

During the Committee meetings, **Contributions in Aid of Construction ("CIAC") were discussed and considered, and as a result of that discussion, it was agreed that CIAC would be charged to the REAs in the context of other adjustments made to the valuation formula for the REAs.** The attached notes, dated January 4, 1983, cite reference to the discussion of CIAC at Paragraph VIII as part of the Committee work. See January 4, 1983 notes, *Exhibit A*. CIAC was a more significant concern to the State Tax Commission valuation method for REAs, as compared to the IOUs, because the REAs had far more CIAC given their rural character as compared to IOUs.

**It was my understanding that the CIAC was reported under Column (H) titled "Non-refundable Contributions," Schedule 1. See Schedule 1, *Exhibit E*.** [Emphasis added.]

### **C. Change in CIAC Reporting by Cooperatives.**

In 1999, the STC's UVS staff reviewed multiplier tables for certain public utility personal property, including the transmission and distribution lines of electric utilities. The review concerned the distribution lines of Investor-Owned Utilities ("IOUs"), such as the Detroit Edison Company.

Among the changes, the new multiplier tables specifically *excluded* CIAC charges for IOUs.<sup>3</sup> Several Detroit-area counties and municipalities challenged the revisions in the new STC multiplier tables, including the CIAC exclusion. The challenge was initiated in the Michigan

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<sup>3</sup> Reportedly, the IOUs had not been reporting CIAC on their personal property tax statements for a decade or so even before the STC's 1999 revisions, although it was Anderson's belief that IOUs should have been reporting CIAC. See second Anderson Affidavit, *Appendix 4*.

Tax Tribunal at MTT Docket No. 273674, *County of Wayne v Michigan State Tax Commission* ["*Wayne, MTT*"]. Several utilities intervened in the case, including IOU Detroit Edison. The Tribunal issued a decision in April 2002 which specifically upheld the CIAC exclusion as part of the multiplier table changes. See excerpt from *Wayne, MTT*, 29-31, **COA, Ex 14**. The Tribunal's decision was appealed to the Court of Appeals, *County of Wayne v Michigan State Tax Commission*, 261 Mich App 174; 682 NW2d 100 (2004) ["*Wayne, Mich App*"], which affirmed the Tribunal's decision with respect to the CIAC exclusion. *Id.*, 235.

In summary, the *Wayne, MTT* and *Wayne, Mich App* decisions affirmed the STC's decision to exclude CIAC reporting from the multiplier tables for Investor-Owned Utilities ("IOUs"), such as Detroit Edison.

**1. Bulletin No. 13 Extends CIAC Exclusion to the REAs.**

The *Wayne, MTT* decision applied directly to CIAC reporting by IOUs. The STC also applied the decision to REAs. On October 28, 2003, the STC released Bulletin No. 13, Paragraph I of which instructed assessors not to include CIAC in the value of electric cooperatives' property:

The State Tax Commission, at its meeting on July 17, 2003, unanimously approved to apply the Michigan Tax Tribunal decision in MTT Docket No. 273674 to the valuation of electric cooperatives. **This means that, STARTING IN 2004, assessors shall not include Contributions in Aid of Construction (CIAC) when valuing the assets of electric cooperatives.** The Commission will be issuing a letter regarding this matter before the end of the year. [Emphasis added.]

See Bulletin No. 13, p 4, attached as *Appendix 5*.

Accordingly, pursuant to Bulletin No. 13, beginning in 2004, the REAs were no longer required to report CIAC. Bulletin No. 13 effectively *amended* the REA CIAC reporting requirement that resulted from the work of the 1984 STC and MECA Committee, and which was implemented by STC Bulletin No. 1 (January 11, 1984), and the forms and schedules adopted by

the STC, in the aftermath of Bulletin No. 1.

**D. The REAs Challenge the Requisite for CIAC Reporting as a Result of the Tribunal Decision.**

Subsequent to the Tribunal's decision in *Wayne, MTT*, the Appellee-Petitioner Cherryland Electric Cooperative ("Cherryland") and other Michigan REAs such as Ontonagon County Rural Electrification challenged the payment of CIAC by REAs in dozens of townships in tax years 1999, 2000, and 2001 pursuant to MCL 211.154 and MCL 211.53a in the Michigan Tax Tribunal ("MTT" or "Tribunal" hereafter).

MCL 211.53a provides for recovery of personal property taxes paid where there is a mutual mistake of fact. MCL 211.154 provides that the STC may correct instances where property has been incorrectly reported or omitted.

**1. Cherryland's Cases Held in Abeyance.**

Cherryland had filed petitions against townships in its northwest Michigan service area. Cherryland's cases at the Tribunal were later placed in abeyance pending the resolution of two cases involving a similarly-situated Petitioner, the *Ontonagon Rural County Electrification Association* (or "Ontonagon") *v Sherman Township*, MTT Docket No. 296073, and *Ontonagon Rural County Electrification Association v Township of Allouez*, MTT Docket No. 296098, by Order of the Tribunal, dated October 13, 2004. Tribunal Judge Stimpson noted there were common issues of law in both cases. See *COA, Ex 2*.

By an Opinion and Judgment, dated November 10, 2004, Tribunal Judge Victoria L. Enyart ruled against Ontonagon and in favor of the Respondents Allouez and Sherman Townships in those cases and dismissed Ontonagon's petition for lack of MTT jurisdiction. See *Ontonagon Rural County Electrification Association v Sherman Township*, MTT Docket No. 296073, *COA, Ex 3*.

The Court of Appeals, in an unpublished Decision, *Ontonagon Rural County Electrification Association v Township of Allouex*, and *Ontonagon Rural County Electrification Association v Sherman Township*, Docket Nos. 265605 and 265606, dated October 17, 2006, affirmed the Tribunal's dismissal. See *COA, Ex 4*. The Michigan Supreme Court denied Ontonagon's Application for Leave to Appeal in an Order, dated March 26, 2007, 477 Mich 1055; 728 NW2d 415 (2007).

**2. Cherryland's Cases are Withdrawn from Abeyance/The Tribunal's Request for Further Information.**

After the *Ontonagon* cases were decided, Cherryland's pending cases with the Respondents-Appellants Blair Township, East Bay Township and Garfield Township (or "Townships" collectively) were removed from abeyance and scheduled for a Status Conference.<sup>4</sup> See *COA, Ex 5*.

Prior to the Status Conference on July 6, 2007, both Cherryland and the Townships presented Memoranda to Tribunal Judge Susan Width, who was assigned to the case.

The Townships' Memorandum, *COA, Ex 6*, argued the *Ontonagon* decisions should be dispositive given the common issues of law between these cases and Cherryland. The Townships' Memorandum stated, in part:

It is the Respondents' initial position in this case involving Cherryland Electric Cooperative that the foregoing rulings in the OCRE (*Ontonagon*) cases should conclude the matter without further action, particularly in light of Judge Stimpson's recognition of the common issues of law between the two sets of cases. [Clarification added.]

Cherryland argued in its Memorandum, *COA, Ex 7*, by contrast:

The Ontonagon Cases, MTT # 296073 and 296098, should not prohibit Petitioner from relief.

A. The Ontonagon Cases were Small Claims Cases. There was no record—the hearing was 'beyond formal';

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<sup>4</sup> These Townships were commonly represented.

- B. The Court of Appeals Opinion was unpublished [see Court Rule 7.215 (C)];
- and
- C. MCL 211.53a was not addressed in the COA Opinion. MCL 211.53a applies irrespective of whether there is a 'valuation issue'.

Following the Status Conference, rather than schedule the matter for a hearing, Tribunal Judge Susan Width issued an Order, dated July 30, 2007, *COA, Ex 8*, requiring the parties and the STC to submit certain information. In the Order, Judge Width requested additional information on one aspect of the Tribunal's findings in the *Ontonagon* cases concerning a purported agreement between MECA and the STC, with respect to the basis for the reporting of CIAC. Judge Width further requested the parties to brief the issue as to whether the required reporting of CIAC resulted from a mistake of fact pursuant to MCL 211.53a.<sup>5</sup> Judge Width's Order concluded:

IT IS ORDERED that the parties shall inform the Tribunal in writing within 28 days of the entry of this Order as to the specifics of the purported agreement and the STC's legal basis for including CIAC and giving "co-ops" a "break with an economic condition factor," if known. The required information shall also include a discussion as to whether the establishing of the assessments at issue pursuant to such an agreement would constitute a mistake of fact or law. The parties shall attach to the required written information indexed copies of any case law cited in the information. [Emphasis added.]

IT IS FURTHER ORDERED that the STC shall inform the Tribunal in writing within 28 days of the entry of this Order as to the specifics of the purported agreement and the legal basis relied upon by the STC for including CIAC and giving "co-ops" a "break with an economic condition factor."<sup>6</sup>

a. **Cherryland's Response to the Tribunal's Request for Information.**

In Cherryland's Response to Michigan Tax Tribunal Order for Information and Application of MCL 211.53a ("Cherryland's Response"), Cherryland argued that MECA and the

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<sup>5</sup> The *Ontonagon* MTT decisions dismissed Ontonagon's alternate basis of relief under MCL 211.154 which Cherryland did not dispute.

<sup>6</sup> The Townships contacted former STC official Leslie Anderson and obtained his Affidavit pursuant to the MTT Order seeking the requested information.

STC agreed to assess IOUs and REAs in the same manner, and that this agreement was represented in STC Bulletin No. 1 of 1984.

Cherryland argued the inclusion of CIAC on STC Form L4175, and the requirement that the REAs report CIAC, constituted a factual mistake because the IOUs were apparently not reporting CIAC. Cherryland's Response, *COA, Ex 12*, p 2 stated:

The form given to the electric cooperatives, in 1984 and thereafter, mistakenly contained CIAC as part of the assessment calculation even though the IOUs were not assessed on CIAC. This mistake was discovered and the process to correct the problem began. The STC recognized the problem and corrected it going forward in Bulletin #13 of 2003, Exhibit # Two by eliminating CIAC from electric cooperatives' assessments, thereby conforming to Bulletin #1 of 1984. But prior to the STC correcting the mistake, both parties mutually relied on the form containing the mistake resulting in incorrect assessments. The problem can be corrected under MCL 211.53a. The addition of CIAC was a factual mistake, mutually relied on by both the taxpayer and assessor.

Cherryland's Response also emphasized that there was no agreement between the STC and MECA to require the REAs to report CIAC—in exchange for a particular application of an Economic Factor ("ECF"), also known as the System Economic Factor ("SCF"). *Id.* Cherryland cited the statements of several MECA officials who participated in the Committee process in support of this position. For example, an Affidavit of Donald R. Pahl, a member of the Committee, *COA, Ex 18* stated:

It was only recently that I became aware that the same procedures for assessing personal property are not being followed among all electric utilities, except for the System Economic Factor. In 1984 when the new assessment procedure was agreed to by MECA, it was my understanding that all utilities would be including Contributions in Aid of Construction (CIAC) in their assessment. Recently I was informed that investor-owned utilities still do not include CIAC monies in their assessment and this is not the procedure that the MECA committee had agreed to.

Cherryland's Response, pp 10-11 concluded:

The STC staff person who originally constructed the first "electric co-op form" as Bulletin #1 of 1984 was being adopted, made the assumption that the IOUs were being assessed on CIAC. But, in fact, they were not. The STC staff mistakenly believed that for the electric cooperatives to be assessed using the same procedures of the IOUs, CIAC should be added to the form. This requirement for

uniformity is the sole legal basis for the addition of CIAC to the form. In reality, CIAC should not have been added to the form. It was a factual mistake that resulted in the assessment formula to contain a number (CIAC) that produced an erroneous assessment; an assessment that did not follow Bulletin #1 of 1984 and created non-uniformity of assessments between IOUs and electric cooperatives.

See Cherryland Response, *COA, Ex 12*.

**b. The Townships' Response to the Order Requiring Information.**

In the Townships' Respondents' Response to Order Requiring Parties to Submit Information ("Townships' Response"), *COA, Ex 9*, the Townships emphasized that it was uncontroverted that following the 1984 Committee process: 1) REAs were clearly required to report CIAC on the STC form, 2) the chief STC official, as well as MECA representatives who participated in the Committee, understood that CIAC was required to be reported, 3) the STC form required that CIAC be reported, 4) the REAs did report CIAC and paid personal property tax on CIAC, and 5) the REAs continued to pay tax on CIAC until the STC revised its reporting policy for REAs with the issuance of Bulletin No. 13 in 2003. *COA, Ex 9*, pp 1-14.

Featured prominently in the Townships' Response, were the Affidavits of Leslie V. Anderson, who was the Manager of STC's Utilities Valuation Section ("UVS") from 1982-1994, and a key participant in the Committee. Mr. Anderson confirmed that CIAC was discussed during the Committee process, and as a result of that discussion, an agreement was reached that the REAs would report CIAC on the STC forms. See Anderson Affidavit, *Appendix 3*, p 3. The Townships' Response also cited the statements of MECA representatives, Thomas G. Hanna and Donald Pahl, which also confirmed their understanding that CIAC was required to be reported. See *COA, Ex 17* and *Ex 18*, respectively.

The Townships emphasized that, under law granting the STC supervisory authority over personal property tax reporting, local assessors were required to follow the STC requirements

(that REAs report CIAC) until the STC revised its policy with the issuance of Bulletin No. 13 in 2003. *COA, Ex 9*, pp 9-11.

The Townships argued, under cases such as *Wolverine Steel Company v City of Detroit*, 45 Mich App 671; 207 NW2d 194 (1973), that if CIAC was mistakenly required to be reported by the STC as a result of the 1984 Committee process (which assumption the Townships contested given the mutual understanding by the key Committee participants that CIAC did have to be reported), such a mistake could only constitute a "mistake of law" which was corrected by the "change of law" confirmed by the STC's issuance of Bulletin No. 13 in 2003. Correspondingly, there was no mutual mistake of fact pursuant to MCL 211.53a. *COA, Ex 9*, pp 11-13.

Within the foregoing context, the Townships discounted Cherryland's claims about the significance of the fact that IOUs may not have reported CIAC—as ultimately immaterial to the bare facts showing that, as a result of the Committee process, CIAC did have to be reported, and was reported, by the rural electric cooperatives. See Townships' Response, *COA, Ex 9*.

## **E. The Tribunal Rules in Favor of Cherryland.**

### **1. The Green Lake Township Judgment in Favor of Cherryland.**

Following submission of the foregoing material submitted by Cherryland and the Townships in response to the Tribunal's Order Requesting Information, on December 30, 2008, the Tribunal issued a Final Opinion and Judgment in a companion case involving Green Lake Township, *Cherryland Electric Cooperative v Green Lake Township*, MTT Docket No. 296025 ("Green Lake Judgment"). The Green Lake Judgment ruled in favor of Cherryland. See *COA, Ex 15*.

The Judgment concluded the sequence of events requiring REAs to report CIAC as a result of the 1984 Committee process constituted a mutual mistake of fact pursuant to MCL 211.53a. The Judgment concluded generally that the record was not clear as to how CIAC was supposed to be handled, and that there was no evidence of any agreement that the REAs report CIAC in exchange for an adjustment in the SEF.

**2. The Motion for Reconsideration with Respect to the Green Lake Township Judgment.**

On January 8, 2009, counsel for Green Lake Township, who was also representing Blair Township, East Bay Township and Garfield Township on a common basis, filed a Motion for Reconsideration and to Amend Findings ("Motion") with respect to the Green Lake Judgment.

**3. The Tribunal's Denial of the Motion for Reconsideration and Issuance of New Judgments.**

On February 16, 2010, the Tribunal issued an Order denying the Motion for Reconsideration of the Green Lake Judgment. Contemporaneously, the Tribunal issued Final Opinions and Judgments in the Blair Township, East Bay Township and Garfield Township cases (or "Township Judgments"). See *Appendix 2*. These cases had been pending awaiting the result of the Motion for Reconsideration of the Green Lake Judgment. The substance of the Judgments for the three Townships is identical in light of the common questions of fact and law.

The first page of the Township Judgments distilled the Tribunal's conclusion:

The Tribunal, having given due consideration to the findings of fact, indicated herein, and the applicable statutory and case law, concludes that the inclusion of contributions in aid of construction (CIAC) in the determination of the true cash and taxable values for the subject personal property for the tax years at issue was the result of a mutual mistake of fact pursuant to MCL 211.53a. . . . The mutual mistake of fact was the parties' shared erroneous belief that CIAC was required to be reported and included pursuant to the Michigan State Tax Commission's personal property statements and directives. [Emphasis added.]

See Blair Township Judgment, p 1, *Appendix 2.a*.

**4. Michigan Court of Appeals Affirmed the Michigan Tax Tribunal Judgments.**

On March 8, 2010, Blair Township, East Bay Township and Garfield Township appealed the Tribunal's Judgments to the Court of Appeals. By an Order, dated April 7, 2010, the Court of Appeals granted the Townships' Motion to Consolidate the three cases for hearing, briefing, oral argument and decision purposes.

On May 15, 2012, the Michigan Court of Appeals affirmed the MTT Judgments in a consolidated Opinion. The COA's key findings are restated, in part, below:

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.

The Townships also assert 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 contained 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.

See COA Opinion, *Appendix 1*.

## ARGUMENT

### **I. The Michigan Court of Appeals and the Michigan Tax Tribunal Erred by Not Characterizing the Petitioner Appellee's Claim for a Property Tax Refund as a Claim About the Invalidity, Irregularity, or Unauthorized Nature of a Tax, Which is a Mistake of Law as Recently Re-Stated by the Michigan Supreme Court in *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69; NW2d 753 (2010)**

#### **Standard of Review**

*Briggs*, 75 recently described the standard of review applicable to a decision of the Tribunal which addressed factual and legal issues associated with MCL 211.53a:

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. We also review de novo the grant or denial of a motion for summary disposition.

The Michigan Supreme Court should address the MTT Judgments, and the COA's Opinion affirming the MTT Judgments, in the context of whether the MTT misapplied or adopted a wrong principal with respect to MCL 211.53a. Review should be de novo as a question of statutory interpretation is involved.<sup>7</sup>

*Briggs* recently restated the distinctions between mistakes of fact and mistakes of law for purposes of MCL 211.53a. At issue in *Briggs* was a Detroit Public Schools' tax that was levied for three years without voter approval. The Michigan Court of Appeals in *Briggs*, 282 Mich App 29; 761 NW2d 816 (2008) had concluded that such an invalid tax could still result from a mutual mistake of fact because "both parties (the City Assessor and Briggs) erroneously believed that

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<sup>7</sup> Note that the MTT's decision on the record contained in the "file" was most analogous to deciding reciprocal motions for summary disposition.

Briggs was required to pay the disputed taxes in 2002, 2003 and 2004, although Briggs had no such obligation." *Id.*, 38-39. The Michigan Supreme Court reversed the Court of Appeals and emphasized that an *unauthorized tax levy constitutes a mistake of law*, not a mistake of fact.

*Briggs* stated:

Also necessary for application of MCL 211.53a is a mistake "of fact." Lest confusion exist in differentiating mistakes of fact and mistakes of law, Michigan courts have held on several occasions that an unauthorized tax levy constitutes a mistake of law. [Emphasis added.]

The COA skirted *Briggs* by finding that the foregoing sequence of facts constituted a shared erroneous belief about the STC Form, rather than a claim about an unauthorized or invalid tax. Contrary to the COA's finding, the salient question concerned the underlying validity of the STC property tax policy, and should have been resolved under *Briggs*, which is reflective of precedent which precludes taxpayer recovery for mistakes in tax law.

**A. The Origins of MCL 211.53a and the Conceptual Distinctions Between Mistakes of Law and Mistakes of Fact, Recently Restated by *Briggs*.**

MCL 211.53a was enacted in 1958 by Public Act 209 of 1958 ("PA 209"). PA 209 was enacted just after the Michigan Supreme Court decided *Consumers Power Company v County of Muskegon*, 346 Mich 243; 78 NW2d 223 (1956).

The facts in *Consumers Power* showed the taxpayer, a utility, overpaid by ten times the correct tax amount based upon a clerical error of the supervisor, of the assessing township, who transposed a decimal point in his assessments. *Id.*, 252. The *Consumers Power* majority would not grant the taxpayer relief absent statutory authority (namely, the absence of MCL 211.53a, which had not yet been adopted). In a lengthy dissenting opinion, however, Justice Smith argued the taxpayer deserved recovery on largely equitable grounds. Justice Smith's dissent, while arguing in favor of the taxpayer's recovery, nevertheless, *distinguished the policy reasons as to*

*why recovery was justified for a mistake of fact between a local assessor and a taxpayer, but why it was not justified for a mistake of tax law made by taxing authorities.*

Justice Smith *described a mistake a fact* as follows:

Here a taxpayer, by reason of arithmetical mistakes by a township supervisor, paid substantially 10 times as much tax as was properly due and owing. . . .

What we have before us is simply an overpayment, to the taxing authorities, arising out of a mutual mistake of fact, an arithmetical, clerical, error. Were we to categorize, we would say that the law of mistake is primarily involved, not the law of taxation. . . .

This is more analogous to the situation where the taxpayer hands over to the tax collector two \$10 bills which are stuck together, thus doubling his proper payment. He demands one back.

By contrast, Justice Smith described the differing considerations involving a *mistake of law*:

In such cases, cases involving alleged invalidities or irregularities in the tax structure itself, the courts have narrowly circumscribed recovery, have hedged it about with a myriad of conditions. The reasons were well stated in *Gould v. Board of County Commissioners of Hennepin County*, 76 Minn 379, 381 (79 NW 303, 530):

If a party could recover from the public whenever there was some illegal or irregular action on the part of public officers in the assessment or levy of the tax, merely because he was ignorant of such illegality or irregularity at the time he paid the tax, the public finances would be thrown into chaos, and frequently municipalities would be reduced to utter bankruptcy. [Emphasis added.]

*Id.*, 252-254.

A review of MCL 211.53a shows it is largely reflective of the pronouncements in Justice Smith's dissent. It specifically emphasizes the need for a "clerical error or mutual mistake of act by the assessing officer and the taxpayer."

MCL 211.53a 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 3 years from the date of payment, notwithstanding that the payment was not made under protest. [Emphasis added.]

Subsequent to the enactment of MCL 211.53a, however, ample authority reflected Justice Smith's pronouncement that such a statute should not apply to later - discovered "illegalities or irregularities" in the "assessment or levy of a tax" which were characterized as "mistakes of law."

*Upper Peninsula Generating Co. v City of Marquette*, 18 Mich App 516, 517; 171 NW2D 572 (1969) described the limited application of the statute:

Although M.C.L.A. § 211.53a (Stat. Ann. 1960 Rev. § 7.97) permits recovery of excess taxes notwithstanding the failure to register a protest, it does so Only if the portion exceeding the lawful amount is paid whether as the result of a mutual mistake of fact or a clerical error. The failure to obtain the voter's' approval for the mileage in excess of the constitutional limitation cannot be characterized as a mistake of fact, and therefore plaintiff is not entitled to relief under this statute. [Original Emphasis.]

*Wolverine Steel Company v City of Detroit*, 45 Mich 671; 207 NW2d 194 (1973) denied a taxpayer a refund under facts akin to those in *Cherryland*. The Wolverine Steel Company paid personal property taxes on imported goods based upon instructions from the Detroit Board of Auditors. Subsequently, the Michigan Court of Appeals, in *City of Detroit v Kenwal Products*, 14 Mich App 657, 549, 662; 165 NW2d 875 (1968) ruled against the State Tax Commission, holding that the levy of personal property tax against the same type of goods as Wolverine Steel had imported, violated the U.S. Constitution. Based upon the *Kenwal* ruling, Wolverine Steel requested a refund of the taxes that it paid pursuant to MCL 211.53a. *Wolverine* ruled that Wolverine Steel could not recover the taxes paid because its claim was not based upon a mistake of fact:

Case law in Michigan also indicates that the appellant may not recover, because if any mistake did occur it was not a mistake of fact.

The error made in the Upper Peninsula case was the same type of error that was made in the present case. In the Upper Peninsula case the City of Marquette levied taxes in violation of the Michigan Constitution. In the present case the appellees levied taxes in violation of the United States Constitution. **In both cases the plaintiff and the defendants thought that the taxes were valid at the time they were paid. In the Upper Peninsula case this was held not to be an error of fact within the meaning of the statute.** The same result must, therefore, be reached in the present case; particularly where the alleged advice was rendered more than 1 ½ years prior to the entry of this Court's decision in Kenwal, supra. [Emphasis added.]

See *Wolverine*, 675-676.

*Briggs* recently re-anchored this line of case law. In *Briggs*, the Detroit Public Schools (“DPS”) had approved a 32.25 mill property tax in 1993. The tax expired on June 30, 2002. Even though the tax had expired, the DPS continued to levy it for tax years 2002, 2003 and 2004 in error under a belief that it had been extended under Proposal A. *Id.*, 72. The taxpayer, Briggs Tax Service, filed an amended petition under MCL 211.53a with the MTT alleging a mutual mistake of fact.

The MTT rejected the petition on the basis that MCL 211.53a required a showing that the assessing officer and the taxpayer made a mutual mistake of fact, and concluded: “An assessor is not tasked with determining, approving, certifying, or verifying a millage, nor is that person qualified to do so.” *Id.*, 74.

The Court of Appeals reversed on the basis that there was a mutual mistake of fact because both parties (the assessor and the taxpayer) “erroneously believed that Briggs was required to pay the disputed taxes in 2002, 2003 and 2004, although Briggs had no obligation.” See *Briggs*, 282 Mich App 29, 38; 761 NW2d 816 (2008).

The Michigan Supreme Court reversed the Court of Appeals and re-instituted the MTT ruling. *Briggs* emphasized that a mutual mistake of fact cannot be shown pursuant to MCL 211.53a, where the mutual mistake was not committed by the assessor, but was committed by a taxing authority, whose tax certification and/or guidelines, the assessor is required to follow.

*Briggs* concluded there was no mutual mistake attributable to the assessor, as required by MCL 211.53a, because the Detroit Public Schools, and not the assessor, had certified the unauthorized tax levy. *Briggs*, concluded:

In order for the three-year limitations period of MCL 211.53a to apply, the "mistake of fact" must be "mutual." that is, it must be shared and relied on by the assessing officer and the taxpayer. No such mutuality exists here. The mistake in this case is attributable to DPS alone, whose CEO certified the tax levied against petitioner pursuant to DPS's statutory duties. In its amended petition before the Tax Tribunal, petitioner acknowledged that DPS, not the assessor, certified the tax.

Nor did the assessor make a mistake in performing his duties in spreading and assessing the tax. In fact, the assessor performed his statutory duties as required, and petitioner has made no allegation to the contrary. Thus, there was no mutual mistake between the assessor and taxpayer, as required for application of MCL 211.53a. [Emphasis added.]

**B. The Facts and Issues in *Cherryland* are Directly Analogous to Those in *Briggs*.**

Despite the COA blatant disregard for the ruling of the Michigan Supreme Court in *Briggs*, the facts and issues in this case are directly analogous to those in *Briggs* and to the earlier *Wolverine* case, and should have been controlled by that precedent. Namely, in this case, the State Tax Commission set personal property tax reporting policy - with respect to CIAC - in 1984. The STC then changed the policy involving CIAC reporting, by electric cooperatives, in 2003, effective for tax year 2004. The local assessor had nothing to do with setting that policy.

Other related findings by the MTT and COA in *Cherryland* are unsupported by the record.

1. **There was no Evidence that the State Tax Commission Property Tax Form Contained an Error. Even if the Form did Contain an Error, that Would Constitute an Irregularity in the Tax, not a Mutual Mistake of Fact.**

The COA Opinion, Appendix 1, found that State Tax Commission (“STC”) Form L-4175 (“Form”), first promulgated in 1984 following the STC Committee process, contained an error, even though the tax was authorized.

The Townships dispute there is any evidence from which the MTT or COA could find any competent evidence that the Form, itself, contained an error. Both the STC and the REAs acknowledged, after the 1984 committee process, that CIAC had to be reported on the Form based upon the revisions in tax policy.

The only possible error alleged by the REAs is that the STC Bulletin No. 1 of 1984, predicate to the Form, stated that the Investor Owned Utilities (“IOUs”) and the REAs were to be treated the same on the Form, and that the IOUs were not reporting CIAC (which factual allegation the Townships dispute), while the REAs were reporting CIAC. Such an allegation, even if true, did not show an error on the Form. It only amounted to an alleged mistake in a factual presumption made in the development of a tax policy - that was then merely implemented by the Form.

The STC required CIAC reporting and the REAs reported CIAC on this Form, for 20 years, until 2003 when the STC, by Bulletin 13, changed tax policy and indicated that CIAC should no longer be reported by REAs. There is no evidence whatsoever that the Form was ever in error, only an allegation that the underlying tax policy erred, which was ultimately amended in 2003. Moreover, even if the Form did contain error, that would clearly constitute an “irregularity” in the tax, not recoverable under MCL 211.53a.

2. **The Township Assessors Did Not Make a Mistake with Respect to CIAC Personal Property Tax Reporting for Purposes of MCL 211.53a.**

Pursuant to the foregoing discussion, the Townships deny the STC Form contained an error. *Even if the Form had contained an error, the local township assessor could not, and did not, err.* All of the errors alleged occurred during the 1984 STC Committee process. Under the express wording of MCL 211.53a, it is the "assessor" who must make the mistake of fact, along with the taxpayer. In this instance, if the mistake did occur, the STC made it, not the assessors. Once the STC approved the form in 1984, which required rural electric cooperatives to report CIAC, the Township assessors *were required* to follow that reporting procedure as a matter of law.

The General Property Tax Act<sup>8</sup> describes the duty of assessors to follow STC personal property tax reporting procedures:

MCL 211.19(2) states:

The supervisor or other assessing officer shall require any person whom he or she believes has personal property in their possession to make a statement of all the personal property of that person. . . .

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<sup>8</sup> See also MCL 209.104:

Sec. 4 The state tax commission shall have general supervision of the administration of the tax laws of the state, and shall render such assistance and give such advice and counsel to the assessing officers of the state as they may deem necessary and essential to the proper administration of the laws governing assessments and the levying of taxes in this state. [Emphasis added.]

and MCL 211.10e:

Assessing officials, whose duty it is to assess real or personal property on which real or personal property taxes are levied by any taxing unit of the state, shall use only the official assessor's manual or any manual approved by the state tax commission, consistent with the official assessor's manual, with their latest supplements, as prepared or approved by the state tax commission as a guide in preparing assessments. [Emphasis added.]

MCL 211.19(5) states:

**A statement under subsection (2) or (3) shall be in a form prescribed by the state tax commission.** If a local tax collecting unit has provided for electronic filing of the statement under subsection (4), the filing format shall be prescribed by the state tax commission. The state tax commission shall not prescribe more than 1 format for electronically filing a statement under subsection (2) or more than 1 format for electronically filing a statement under subsection (3). [Emphasis added.]

Correspondingly, once the STC changed its policy with respect to REA reporting of CIAC with the issuance of Bulletin No. 13 in 2003 (effective for the 2004 tax year), the assessors were required to follow the change:

Bulletin No. 13, p 4 stated:

I. Exclusion of CIAC When Valuing Electric Cooperatives

The State Tax Commission, at its meeting on July 17, 2003, unanimously approved to apply the Michigan Tax Tribunal decision in MTT Docket No. 273674 to the valuation of electric cooperatives. This means that, STARTING IN 2004, assessors shall not include Contributions in Aid of Construction (CIAC) when valuing the assets of electric cooperatives. The Commission will be issuing a letter regarding this matter before the end of this year. [Emphasis added.]

See Bulletin No. 13, p 4, *Appendix 5*.

Like the Detroit Public Schools in *Briggs* (which was responsible for levying the tax at issue), the STC was legally responsible for preparing the Form requiring rural electric cooperatives to report CIAC, not the assessor. Just as the assessor in *Briggs* was legally required to collect the Detroit Public Schools' tax (even though it was later determined to be invalid), the Townships' assessors were required to collect taxes using the personal property tax reporting statements and forms approved by the STC pursuant to MCL 211.19(2) and (5).

The Michigan Supreme Court noted in *Briggs* that Brigg Tax Services' petition filed with the MTT acknowledged that the Detroit Public Schools, not the City of Detroit assessor, certified the invalid tax. Likewise, under paragraphs 8 and 9 of Cherryland's petitions filed with the

MTT, *Cherryland* acknowledged that the STC had approved the personal property tax reporting form, requiring CIAC reporting, and not the assessor. In fact, nowhere in the sections of *Cherryland's* petitions, addressing MCL 211.53a, is there an allegation that any of the Townships' assessors committed a mistake of fact with respect to CIAC reporting. The mistake has been attributable entirely to the STC. See *Cherryland Petitions, COA, Ex 1*.

In summary, if the evidence can be construed to show mutual mistakes occurred during the 1984 Committee process, those mistakes could only be attributed to the STC, and not to the assessors. Correspondingly, the mistakes can only constitute mistakes of law, correctable by changes in law, and cannot be attributed to the assessors for purposes of MCL 211.53a.

**C. The Court of Appeals Erred in its Reliance on *Ford Motor Company v City of Woodburn*, rather than *Briggs*.**

Rather than rely upon *Briggs* and *Wolverine*, which would clearly characterize the allegations in the *Cherryland* tax appeal as mistakes of law, the COA relied erroneously, instead, primarily upon *Ford Motor Co v City of Woodhaven*, 475 Mich 425 (2006) and similar cases such as *Eltel Associates, LLC v City of Pontiac*, 278 Mich App 588 (2008).<sup>9</sup>

Given the fact pattern at issue, the COA's erroneous reliance on *Ford* and *Eltel*, has critical implications for statewide property tax policy, which demands correction. The COA's error, left uncorrected, could lead to the kind of public finance debacle Justice Smith warned about in his articulate dissent in *Consumer's Power* 252-254 that predicated MCL 211.53a. Justice Smith made it clear that property tax recoveries for mistakes must be limited to the mutual mistakes and clerical errors of taxpayers and assessors, not the errors of taxing authorities, or bodies such as the State Tax Commission, with statewide tax policy authority.

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<sup>9</sup> In fact, the COA's misplaced reliance upon *Ford* and *Eltel* in *Cherryland* is eerily similar to the same reliance the COA panel placed on those same cases in *Briggs*, leading to reversal by the Michigan Supreme Court.

The COA in *Cherryland* did exactly what Justice Smith warned against by attributing an alleged error in tax policy, made 20 years earlier, to local assessors.

A review of *Ford and Eltel* and similar cases, shows they have no application to the fact patterns involved in *Cherryland*. By contrast, both cases addressed facts where the errors did occur “on the ground” between the assessor and the taxpayer, reflecting the correct application of MCL 211.53a.

For example, in *Ford*, Ford Motor Company had double-reported certain assets on its personal property tax statements. *Id.*, 430. The Court concluded the mistake was made by both the local assessor and by Ford Motor at the time the statement was filed, and the tax paid, and was therefore a mutual mistake of fact deserving of recovery under MCL 211.53a. *Id.*, 443.

Likewise, in *Eltel*, the assessor mistakenly assessed certain property transferred to a taxpayer before “tax day” (December 31), when the property was really transferred after tax day. *Id.*, 589-590. The taxpayer paid the tax relying upon the assessor’s conclusion. *Eltel* ruled the taxpayer was entitled to a refund under MCL 211.53a because there was a mutual factual mistake between the assessor and taxpayer at the time the tax was paid. *Id.*, 592.

Likewise, in *Consumer’s Power* - the case that preceded MCL211.53a, but which fact pattern Justice Smith said justified MCL 211.53a - a township supervisor, acting as the township assessor, displaced a decimal point, resulting in a tax ten times higher than required, *Id.*, 251-252

Likewise, in *Spoon-Shacket Company, Inc. v County of Oakland*, 356 Mich 151; 97 NW2d 25 (1959), a case that relied upon Justice Smith’s dissent in *Consumer’s Power* and which overruled the *Consumer’s Power* majority (pre-dating the effectiveness of MCL 211.53a), the assessor had erred by assuming that certain lots owned by a taxpayer contained homes when they were really vacant. This resulted in an assessment ten times higher than required. *Id.*, 153.

The clear common thread in all of these cases, *Ford*, *Eltel*, *Consumer's Power* and *Spoon Shacket*, is that a mistake or error was *made by the local assessors* about property subject to tax that was *shared by the taxpayer* at the time the tax was paid.

In *Cherryland*, by contrast, no error whatsoever was made by the local assessor. The local assessors merely followed State Tax Commission property tax policy and did so for 20 years, from 1984 until tax year 2004, when the new STC policy was implemented.

*Briggs* distinguished the fact patterns in *Eltel* and *Ford* from those showing a mistake of law.

*Briggs*, 84 stated:

*Eltel* involved a purely factual issue concerning the date on which title to property passed from a tax-exempt owner to a nonexempt owner. The assessor relied on the date of the deed and concluded that the property was subject to the tax for the year in question.

...  
However, *Eltel* did not involve the validity of the underlying tax, which is a legal issue. Therefore, it is of no consequence to the disposition of this case. [Emphasis added.]

With respect to *Ford*, *Briggs*, 84, commented:

Critical to our decision in *Ford* was the fact that the assessor and Ford shared a mistaken belief that resulted in an erroneous assessment, i.e., the amount of Ford's property subject to tax. Ford and the assessor mistakenly believed that X amount of Ford's property was taxable, when in reality, Y amount was properly taxable. In contrast, the mistake in this case was the imposition of an unlawful tax. [Emphasis added.]

## **CONCLUSION AND RELIEF REQUESTED**

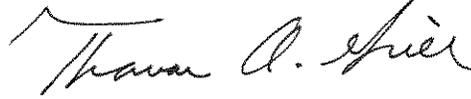
For the foregoing reasons, the Respondent-Appellant Townships request that this Honorable Supreme Court enter an Order:

1. Granting the Townships' Application for Leave to Appeal from the Michigan Court of Appeals Opinion, dated May 15, 2012;

2. Granting the Townships' request for peremptory reversal of the Michigan Court of Appeals Opinion dated May 15, 2012 and of the Michigan Tax Tribunal Final Opinions and Judgments, dated February 16, 2010, against the three Respondent-Appellant Townships.

Respectfully submitted,

RUNNING, WISE & FORD, P.L.C.



Dated:

By:

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**STATE OF MICHIGAN**

**MICHIGAN SUPREME COURT**

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

**CHERRYLAND ELECTRIC COOPERATIVE,  
Petitioner-Appellee,**

**v**

**Supreme Court Case No.  
COA Docket No. 296829  
Lower Tribunal/MTT Docket # 296021**

**BLAIR TOWNSHIP,  
Respondent-Appellant,**

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**CHERRYLAND ELECTRIC COOPERATIVE,  
Petitioner-Appellee,**

**v**

**Supreme Court Case No.  
COA Docket No. 296830  
Lower Tribunal/MTT Docket # 296028**

**EAST BAY TOWNSHIP,  
Respondent-Appellant,**

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**CHERRYLAND ELECTRIC COOPERATIVE,  
Petitioner-Appellee,**

**v**

**Supreme Court Case No.  
COA Docket No. 296856  
Lower Tribunal/MTT Docket # 296026**

**GARFIELD TOWNSHIP,  
Respondent-Appellant.**

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**RESPONDENT-APPELLANTS' MOTION FOR PEREMPTORY REVERSAL**

NOW COME the Respondent Appellants, by and through their attorneys, Running Wise & Ford, PLC, which bring the following Motion for Peremptory Reversal pursuant to MCR 7.302 (H)(1) and MCR 7.313(A).

1. In *Briggs Tax Service, LLC v Detroit Public Schools*, 485 Mich 69; 780 NW 2d 753 (2010) the Michigan Supreme Court, recently and comprehensively, addressed the distinction between mutual mistakes of fact, and mistakes of law, when construing MCL 211.53a.

2. *Briggs*, 77 emphasized that before a taxpayer can recover property taxes under MCL 211.53a, there must be a mutual mistake of fact or clerical error made by the local assessor and the taxpayer.

3. *Briggs*, 81 emphasized that no recovery is available under MCL 211.53a where a claim questions the invalidity or irregularity of the tax, itself.

4. *Briggs*, 78 further distinguished claims about the invalidity or irregularity of the tax from claims where the local assessor makes a mistake or error that is shared by the taxpayer at the time the tax is paid. Such fact patterns were present in cases such as *Ford Motor Company v. City of Woodhaven*, 475 Mich 425; 716 NW2d 247 (2006) and *Eltel Associates, LLC v. City of Pontiac*, 278 Mich App 588; 752 NW2d 492 (2008).

5. On February 16, 2010, prior to the Michigan Supreme Court's release of the *Briggs*' Decision on March 30, 2010, the Michigan Tax Tribunal ("MTT") issued companion Final Opinions and Judgments ("Judgments") in three cases granting the claims of Cherryland Electric Cooperative ("Cherryland") for recovery of personal property taxes assessed against part of its transmission wire, known as "contribution in aid of construction" ("CIAC"), pursuant to MCL 211.53a.

6. The MTT Judgments applied to the Respondent- Appellants Blair Township, East Bay Township and Garfield Township (“Townships”) as identified in the caption above.

7. The MTT Judgments relied in their reasoning upon *Ford*, *Eltel* and most notably upon the Court of Appeals’ Decision in *Briggs*, 282 Mich App 29; 761 NW 2d 816 (2008).

8. On March 5, 2010, the Townships filed claims of appeal to the Court of Appeals with respect to the three MTT Judgments which were later consolidated for briefing, oral argument and decision purposes.

9. In their Appeal Brief to the Court of Appeals, the Townships centered their argument upon the Michigan Supreme Court’s recent March 30, 2010 Decision in *Briggs*, reversing the Court of Appeals.

10. In the *Cherryland* consolidated cases, the facts showed Cherryland’s claim for a property tax refund, under MCL 211.53a, stemmed from alleged mistaken presumptions made in the formulation of State Tax Commission ( or “STC”) personal property tax reporting policy, during a STC Committee process in 1984, with respect to CIAC.

11. The facts further showed that STC policy was amended in 2003 so that the requirement for rural electric cooperative utilities, like Cherryland, to report CIAC was eliminated beginning in the 2004 tax year, and that if a mistake did occur, the STC made it, not the local assessors.

12. Because Cherryland Electric’s claims under MCL 211.53a clearly addressed questions about the invalidity and/or irregularity of STC property tax reporting policy, the Townships argued forcefully that these claims should clearly have been classified as mistakes of law under the Michigan Supreme Court’s decision in *Briggs*, and not subject to refund pursuant to MCL 211.53a.

13. Despite the clear application of the Michigan Supreme Court's March 30, 2010 decision in *Briggs* to the facts and issues in the MTT *Cherryland* Judgments, on May 15, 2012, the Court of Appeals affirmed the MTT Judgments.

14. The Townships have filed an Application for Leave to Appeal from the Court of Appeals Opinion, dated May 15, 2012.

15. Because the Michigan Supreme Court's ruling in *Briggs* comprehensively addressed distinctions between mistakes of law and mutual mistakes of fact under MCL 211.53a, because *Cherryland* clearly involved claims about State Tax Commission tax policy mistakes made 20 years earlier, and because the Court of Appeals facially and blatantly ignored the Michigan Supreme Court's comprehensive precedent in *Briggs*, the Court of Appeal's Opinion in *Cherryland*, and the underlying MTT Judgments, deserve and demand peremptory reversal.

WHEREFORE, based upon the foregoing reasons, and further based upon the argument contained in the Respondent-Appellant Townships' Application for Leave to Appeal from the Court of Appeals' Opinion, dated May 15, 2012, the Respondent-Appellant Townships respectfully request this Honorable Supreme Court issue an Order:

1. Reversing the Michigan Court of Appeals' May 15, 2012 consolidated Opinion in Docket Nos. 296829, 296830 and 296856 on a peremptory basis.

2. Reversing the Final Opinions and Judgments of the Michigan Tax Tribunal, dated February 16, 2010, in MTT Docket Nos. 296021, 296028 and 296026 on a peremptory basis.

**Respectfully submitted,**

**RUNNING, WISE & FORD, P.L.C.**



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