STATE OF MICHIGAN

COURT OF CLAIMS

Associated Builders and Contractors of Michigan, National Federation of Independent Business, Inc., Senator Edward McBroom in his official capacity, Representative Dale Zorn, in his official capacity, Rodney Davies, Kimberley Davies, Owen Pyle, William Lubaway, Barbara Carter, and Ross VanderKlok	**Case No.: 23-000120-MB**
	Hon. Elizabeth L. Gleicher

Plaintiffs,

v.

Treasurer of Michigan, Rachael Eubanks, in her official capacity

Defendant.

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PLAINTIFFS' 11/16/2023 REPLY BRIEF IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION AND IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY DISPOSITION

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STATEMENT OF FACTS

This matter concerns the construction of MCL 206.51(1), which sets the income tax rate for the state of Michigan. Defendant State Treasurer has announced that, pursuant to MCL 206.51(1)(c), the rate will decrease from 4.25% to 4.05% for tax year 2023. Prior to that announcement, the Attorney General, at defendant's request, issued an opinion that any year the tax rate decreases, it will revert to 4.25% for a new analysis under MCL 206.51(1)(c). AG Opinion 7320 (March 23, 2023), available at Complaint, Exhibit 1. Plaintiffs filed this action, and they contend the income tax rate does not revert.

The parties have filed cross motions seeking summary disposition. Defendant filed a response and plaintiffs have been granted the instant reply.

ARGUMENT

I. This Court has subject matter jurisdiction and MCL 205.22 is inapplicable.

Defendant contends MCL 205.22 applies and is jurisdictional. That provision states: "A taxpayer aggrieved by an assessment, decision, or order of the department may appeal the contested portion of the assessment, decision, or order to the tax tribunal within 60 days, or to the court of claims within 90 days after the assessment, decision, or order." *Id*.

Rather than indicate a triggering event, defendant claims she has "relied on Plaintiffs' own pleading concerning when the statute of limitations began to run." Defendant's 11/06/23 Response at 2. First, plaintiffs' complaint indicated that "Although it is **unclear precisely** when Plaintiff's claims accrued, **it is at least arguable** that they accrued as of March 29, 2023, upon Treasurer Eubank's announcement of the income tax reduction for fiscal years 2023-2024. Exhibit 9." Complaint at ¶ 47 (emphasis added). This is not an admission against interest, and more

importantly, plaintiffs do not have the power to change Michigan law through their pleadings. Neither the Court of Claims Act nor MCL 205.22 morphs due to a party's pleadings.

As there is no appeal of an "assessment, decision, or order of the department" for the reasons discussed in plaintiffs' prior briefing, MCL 205.22 is inapplicable.

II. Justiciability doctrines will not operate to prevent a decision on the merits.

A. Standing

Defendant adds nothing new to its standing argument and plaintiffs rely on their previous briefing.

B. Ripeness

In their complaint at ¶¶ 58 and 59, plaintiffs noted that as January 1, 2024, employers can be liable for overwithholdings.[1] Mich Admin Code, R 206.22.[2] In their complaint at ¶ 63, plaintiffs noted that many Michigan taxpayers will have to pay quarterly estimated taxes under MCL 206.301.[3] These payments would be due April 15, 2024.

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[1] Again, plaintiffs' theory is that the 2024 tax rate has a ceiling of 4.05% and can theoretically go lower after the MCL 206.51(1)(c) formula is computed.

[2] In pertinent part, that provision of the code states:

> (1) If an employer overwithholds income tax from an employee's wages, or if he withholds Michigan tax where he should not have withheld Michigan tax, he may repay the amount withheld in error to the employee at any time within the same calendar year. He shall obtain a receipt from the employee for the amount refunded and keep it as a part of his own records. The employer may adjust his records internally and deduct the amount refunded from the tax owing on his next return or he may ask for a cash refund.

[3] Plaintiffs would further note that provision requires a "payment of estimated tax shall be computed on the basis of the annualized rate established under section 51 for the **appropriate tax year to which the estimated tax payment** is applicable." MCL 206.301(10) (emphasis added).

Defendant entirely ignores this and thereby contends this matter only "involves the income tax rate for 2024, and individual tax returns for that year will not be due until April 2025." Defendant's 11/06/23 Response at 5.

As prior, defendant contends this suit is not ripe because "the Legislature could decide to change the law" before individual taxpayers could be harmed.[4] As noted above, the effect of defendant's improper action begins to affect Michigan's 4.9 million taxpayers as of January 1, 2024. Even if defendant was correct that the possibility of a legislative change could prevent declaratory of mandamus relief, there is no possibility of a legislative change before January 1, 2024.[5]

III. Under MCL 206.51(1), the tax year 2023 income tax reduction made pursuant to MCL 206.51(1)(c) remains in place until such time as the formula from that subsection would cause it to lower again thereby setting that newer rate as the income tax rate cap until the formula would cause it to decrease again.

Oddly, defendant begins her merits analysis by stating that "the correctness of the Attorney General's opinion is not an issue in this case." Defendant's 11/06/23 Response at 6. That opinion begins: "You have requested my opinion on whether the individual income tax rate reduction under MCL 206.51(1)(c) is temporary (i.e., for one year only) or permanent (i.e., for all subsequent years). Complaint, Exhibit 1. This opinion has been treated as binding by defendant. Complaint, Exhibit 8. As there is significant overlap between the opinion and the briefing defendant has made in the instant case and this Court could rely on either, plaintiffs have addressed both.

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[4] Presumably, defendant means that statement to refer to April 2025, the last month that 2024 individual returns could be timely filed.

[5] House Concurrent Resolution 10 (passed November 9, 2023) set the last day of the legislative session at November 14, 2023. The Legislature will not reconvene until January 10, 2024. Const 1963, art 4, sec 13.

In her response, defendant adds nothing new regarding her dictionary-definition argument. Plaintiffs' reading allows both "current rate" and "that rate" to have meaning, while defendant's does not.

Regarding the fact that the Legislature had previously used an explicit numerical term to start an income tax formula – 1983 PA 15's 3.9% – defendant disagrees that "if the Legislature opts to carry out its intent in one way, a subsequent method must mean that the intent was different." Defendant's 11/06/23 Response at 5. The Michigan Supreme Court has previously analyzed one statute by comparing it to another with what defendant admits were "similar terms." See *Honigman Miller Schwartz and Cohn LLP v Detroit*, 505 Mich 284, 311-12 (2020). But, defendant contends that two scenarios where the Legislature had income-tax formulas that started with a base rate (1983's 3.9% and 2015's "current rate") should not be analyzed under *Honigman*. Plaintiffs disagree.

1983 PA 15's 3.9% helps provide clarity as to which dictionary definition of "current" is correct. The 2015 Legislature meant "most recent" not "existing at the present time" (by which defendant and the Attorney General mean the 2015 income tax rate of 4.25%) because the Legislature could have just used 4.25% in place of "current" or struck "current" entirely.

One area addressed in both the Attorney General's opinion and defendant's brief are policy arguments. Defendant claims refuting them is knocking down "strawmen" as there are "necessary/adverse implications" to plaintiffs' construction of MCL 206.51(1)(c). Defendant's 11/06/23 Response at 8-9. Defendant again claims, "Plaintiffs['] construction could result in a zero tax rate." *Id*. at 9. Defendant did not repeat their lesser-included concern that it would be fiscally imprudent to have permanent tax cuts.

Unaddressed by defendant is the 2015 Senate fiscal analysis showing that as the tax rate lowers the chances of further rate reductions lowers because there will be less tax revenue collected; the decades that Michigan did not have an income tax; the various times Michigan voters rejected a constitutional amendment to allow an income tax; and the fact that 9 states do not have an income tax.

It gets worse. The very policy arguments defendant has put forward were placed before the 2015 House and Senate and rejected. The income tax bill, 2015 PA 180, started as SB 414 and was part of a six-bill road funding package.

The House voted on the (H-3) version of SB 414[6] on October 21, 2015. That version contained the "current rate" and "that rate" language and to start in 2019. The computation of the triggering event differed somewhat, but the same policy question as the wisdom of a permanent tax cut was present.

Representative Townsend[7] argued against passage.[8] He called SB 414 a "fiscal time bomb." Further, he noted that after a tax cut was put in place there could be future drops in revenue: "We can have a significant drop, and yet we will be continuing to lock in that cut in the income tax. Now, some people are sitting in this room going 'yes, exactly, that's what I want.' Be careful what you wish for." He continued:

> The House Fiscal Agency estimates that if this income tax rollback had been in place this year, the general fund would've been cut by §680 million. And the problem is there's no floor. That's $680 million in year one. And if there's another growth in revenue above inflation, there's another cut. Well, you don't have to

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[6] https://perma.cc/DDT2-LT8Z.

[7] While not relevant, he was a Democrat representing the 26th District.

[8] His full remarks are available at https://www.house.mi.gov/VideoArchivePlayer?video=Session-102115.mp4 at time stamp 7:08:41 to 7:17:10.

> have—you don't have to cut—you don't have to have too many years in a row like that before the general fund is dramatically depleted, the income tax has been cut so far that we're reaching the point where we can actually begin to affect the school aid fund.

Voting began **10 minutes later**. The H-3 version, which included the "current rate" and "that rate" language passed on 61-45 roll call vote. 86 Michigan House Journal at 1864-65 (October 21, 2015).

The H-3 version was amended in the Senate to have the formula begin in 2023 instead of 2019 and by increasing the amount of excess revenue needed to trigger a tax cut. Its final passage in the Senate occurred on November 3, 2015. After other bills were voted on, then-Senator Gregory[9] offered his no-vote explanation.[10] He addressed the other bills, but also the upcoming vote on SB 414:

> Colleagues, I rise today to offer my "no" vote explanation on the current roads package. This plan would deplete the General Fund by providing income tax rate cuts whenever the General Fund revenues grow faster than inflation, a loss of $230 million per 1/10 of a point. In my view, this is fiscally irresponsible and is not designed to fix a real problem.
>
> Currently in Michigan, we have a regressive tax system that penalizes low- and middle-income families. Cutting or repealing the personal income tax would primarily benefit the wealthy individuals who already enjoy some of the lowest state and local tax rates. This is unfair to the vast majority of Michigan residents.
>
> Unfortunately, the consumer price index does not take medical care, education, or infrastructure costs into account—all items that routinely eclipse inflation. This will result in a tax cut tied to a hugely unrealistic indicator of our state's fiscal success. **In addition, a House Fiscal Agency analysis noted that a one-time revenue increase caused by an unpredictable or unusual economic event could permanently reduce the income tax rate.**
>
> I'll say it again: This has the potential to diminish the General Fund and make it harder for the state to provide the educational, correctional, and medical services our middle-class families need. It also makes it harder to recoup funding for—you guessed it—road maintenance. This is a tax nightmare that our successors will have to untangle years from now as they search for their own solutions to fix our still-crumbling infrastructure.

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[9] While not relevant, he was a Democrat and representing the 11th District. He passed in 2022.

[10] See Const 1963, art 4, sec 18.

> This package of bills doesn't make good fiscal sense for anyone and will not fix our roads. These bills should be vetoed by the Governor, and I urge my colleagues to vote against this legislation.

100 Michigan Senate Journal at 1771 (November 3, 2015) (emphasis added).[11] About 15 minutes later, the Senate passed SB 414.[12]

That same day, the bill went back to the House where it was voted upon without any relevant speeches. The roll call vote was 61-46 in favor. 86 Michigan House Journal at 1957-58 (November 3, 2015).

Plaintiffs have made it clear throughout this litigation that policy arguments do not affect the legal question of whether a statute is clear. First the Attorney General and now defendant, meanwhile, have sought to backdoor policy considerations into their preferred "clarity" reading of MCL 206.51(1)(c). These very policy considerations – be they general fiscal "irresponsibility" or dramatic depletion of the income tax – were considered by the 2015 Legislature and did not prevent passage of MCL 206.51(1)(c). Defendant may consider the passage of that provision to have "adverse implications," but the 2015 Legislature did not. "The dispute over the wisdom of a law . . . cannot give warrant to a court to overrule the people's Legislature." *Mayor of City of Lansing v Mich Pub Serv Comm'n*, 470 Mich 154, 161 (2004).

With policy considerations off the table, defendant is left only with their statutory construction argument based on a dictionary definition. That definition is contrary to past

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[11] Senator Gregory's remarks on SB 414 begin at 33:34 of the November 3, 2015, Senate session. t.ly/6AwcM

[12] The consideration and vote occurred at 47:00 to 48:32. There is no record roll call vote in the Senate Journal, but the video shows the final version was adopted 24-2.

legislative practice and it less logical than plaintiffs' proposed definition. See1983 PA 15. As a matter of statutory construction, plaintiffs should prevail.

IV. Plaintiffs are entitled to declaratory relief and/or a writ of mandamus.

A. Mandamus

Defendant's mandamus argument adds nothing new and as such plaintiffs rely on their prior briefing.

B. Declaratory relief

Regarding declaratory relief, defendant incorrectly claims plaintiffs did not address it sufficiently in prior briefing. In their 10/17/23 brief, plaintiffs discuss the case law on standing and declaratory relief on pp 12-13, and the harm individual taxpayers will suffer without that relief on pp 21-22. Plaintiffs' two briefs and complaint are sufficient to show the need for declaratory relief for individual taxpayers.

RELIEF REQUESTED

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

Respectfully Submitted,

Dated: November 16, 2023

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