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# REMEDY OR IRONY?: THE FLAWED JUDICIAL INTERPRETATION OF MCL § 211.53A

BY

MATTHEW J. ROCKEY-HAWLEY

“Remember your past mistakes just long enough to profit by them.” – Dan McKinnon

“Mistakes are a fact of life. It is the response to the error that counts.” – Nikki Giovanni

## INTRODUCTION

Imagine a taxpayer that is building a new apartment complex. The local tax assessor evaluates the apartment complex, but incorrectly filed the building permit with the completed construction projects. Thus, the taxpayer is taxed as though this complex is complete. Further, the assessor fails to re-assess the property in later years through a site visit. The taxpayer pays excess taxes for several years before this problem is corrected. What about the taxpayer who prepares personal property statements and incorrectly classified certain property, included property that had been sold, failed to note exemptions on various property, or misidentified the acquisition year of various properties. Despite the errors being reported to the local taxing authority, the excess taxes paid are not refunded to the taxpayer. When a taxpayer and the local taxing authority stipulate to a refund alleging that a mutual mistake of fact existed, it would seem that the taxpayer should be refunded the excess taxes paid. Yet, in all three cases, the Michigan Tax Tribunal concluded that the taxpayer was not due a refund.

The three fact patterns mentioned above would appear to provide illustrative examples

of reasoning why the Michigan Legislature enacted MCL § 211.53. However, the above-mentioned fact patterns are the result of the Michigan Courts interpretation of MCL § 211.53a. Through a series of cases, the Michigan Courts have interpreted a simple remedial statutory provision to the point of forever foreclosing a taxpayer's ability to obtain a refund when a mutual mistake of fact or clerical errors exists.

This paper will examine the history of the enactment of MCL § 211.53a and the current flawed application by the Michigan Courts. Part one will explore the history leading to the implementation of Section 53a. The focus of this Part will be a discussion of the underlying equitable principles of taxation through the case law that existed when Section 53a was enacted.. At the end of Part One, the underlying threads linking the case law together will be discussed providing an insight into the reasoning of why Section 53a was enacted.

Part Two of this paper outlines the current statutory interpretation of Section 53a. The interpretation of Section 53a involves jurisdictional elements as well as due process issues that will be discussed in this Part. This Part also discusses the manner in which the Michigan Courts have defined "mutual mistake of fact." Finally, this Part discusses the use of *in pari materia* to narrowly interpret Section 53a with Section 53b.

#### I. HISTORICAL ANALYSIS AND BACKGROUND OF MCL § 211.53A.

An old saying goes that a person is not working if he is not making mistakes. However, once a person has made a mistake, the relentless task becomes undoing what has been done. In the context of property tax matters correcting an obvious error it should seem

as simple as following the statutory requirements of MCL 211.53a.<sup>1</sup> However, as with most things in life, things are never as simple as they appear, and the refund of wrongfully paid property tax is one such prima facie example.

In 1958, the Michigan Legislature enacted MCL 211.53a, (Section 53a). Under this remedial statutory provision, a taxpayer's recovery of excess property taxes paid is limited to two specific set of circumstances, clerical error or mutual mistake of fact.<sup>2</sup> The current statutory interpretation narrows recovery to those limited instances in which both the assessing officer **and** the taxpayer believe that a clerical error or mutual mistake of fact exists.<sup>3</sup> When the Legislature enacted Section 53a in 1958, the Michigan Supreme Court had recently held that a taxpayer was not entitled to "recover taxes paid under mutual mistake" and to allow for such recovery would be "exercising legislative prerogatives."<sup>4</sup> In *Consumers Power Company*, the taxpayer received 1,200 separate tax statements from 63 counties in Michigan. Five individuals within the company tediously reviewed all the

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<sup>1</sup> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of 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.  
MCL § 211.53a.

<sup>2</sup> MCL § 211.53a.

<sup>3</sup> The Michigan Legislature enacted MCL § 211.53b, a detailed statutory provision allowing the local assessing officer or taxpayer to protest the clerical error or mutual mistake of fact to the local board of review in December for summer property taxes, and in July for winter property taxes. *See id.* This statutory provision states that "[i]f there has been a clerical error or a mutual mistake of fact relative to the correct assessment figures, the rate of taxation, or the mathematical computation relating to the assessing of taxes, the error or mutual mistake shall be verified by the local assessing officer and approved by the board of review . . . ." *Id.*

<sup>4</sup> *Consumers Power Co. v. County of Muskegon*, 346 Mich. 243, 250, 78 N.W.2d 223, 227 (1956).

statements prior to payment.<sup>5</sup> During 1951 and 1952, the taxpayer paid excess property tax payments to Muskegon County amounting to \$30,659.36 in excess payments but did not label them as having been made under protest.<sup>6</sup> The Michigan Supreme Court reversed the trial court's holding that the taxpayer was entitled to a refund of all excess payments.<sup>7</sup>

At the time of *Consumers Power Company*, the only statutory provision that allowed for a taxpayer to recover excess payments from the taxing authority required that the taxes be made under protest to the treasurer of the taxing authority.<sup>8</sup> The procedural prerequisites for recovery included requirements that the taxpayer state in writing the ground(s) for protest and, within 30 days of paying on protest, sue the township for recovery of the amount paid under protest.<sup>9</sup>

In *Consumers Power Company*, the taxpayer's actions were not compliant with the procedural prerequisites for a statutory remedy. Thus, the plaintiff asserted the claim that "its

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<sup>5</sup> *See id.* at 246, 78 N.W.2d at 224.

<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See id.* at 251, 78 N.W.2d at 227.

<sup>9</sup> *See MCL § 211.53 (1948)*. The court in *Consumers Power* noted that the taxpayer had a cause of action under Section 211.381 that states "[a]ny corporation . . . , who in good faith, shall pay the taxes . . . on real property erroneously assessed, shall have a right of action in assumpsit against the owner or owners of such property for the taxes thereon so paid, and shall be entitled to interest from the date of such payment, at the rate of 5 per centum per annum." *Consumers Power Co.*, 346 Mich. at 251, 78 N.W.2d at 227. An interesting note is the courts statement that the taxpayer had a cause of action under MCL 211.381. Under the facts presented to the court, Consumers Power Company's payment was for personal property taxes on property they owned. Thus, the cause of action would have been filed against themselves. The court noted that this statutory language did not provide for recovery when the taxes were paid by mistake. *See id.* at 251, 78 N.W.2d at 257. In denying the equitable relief requested by Consumers Power Company, the court stated "to grant the relief requested by the plaintiff would require the Court to exercise legislative prerogatives—namely to write into the statute the right to recover taxes paid under mutual. mistake. *This cannot be done.*" *Id.*

payments of excess taxes was due to a mistake of fact, both on part of the assessor, who figured the tax and made the levy, and on the part of plaintiff, who failed to discover the error until after the taxes had been paid.<sup>10</sup> However, the court refused to apply the equitable principles advanced by the taxpayer, and noted that it “is not possible to adjudicate issues arising under taxation laws by the general application of equitable principles.”<sup>11</sup> The taxpayer asserted that the mutual mistake of fact existed when the taxing authority figured the tax, and the taxpayer, in failing to discover the error, paid the tax.<sup>12</sup> Hence, the mutual mistake of fact was the result of the taxing authority’s assessment of the property, and the taxpayer’s failure, to notice the error, thereby remitting payment.

The Court addressed two principles asserted by the taxpayer. First, “a payment of taxes under a mistake of fact (as distinguished from a mistake of law) has been held not to be voluntary, and is therefore recoverable.”<sup>13</sup> Second, the taxpayer asserted that “in the absence of a statute to the contrary, it is generally held that taxes voluntarily paid under a mistake of law, with full knowledge of the facts, cannot be recovered back, while taxes paid under a mistake of fact may ordinarily be recovered back.”<sup>14</sup> Despite the court’s rejection of the taxpayer’s asserted equitable principals and ultimately, it’s denial of the taxpayer’s requested

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<sup>10</sup> *Id.* at 246, 78 N.W.2d at 225.

<sup>11</sup> *Id.* at 247, 78 N.W.2d at 225. This holding is limited to those cases that involve a taxpayer who fails to pay his property taxes under protest. When *Consumers Power Company* was decided, a taxpayer was afforded a refund when property taxes were not paid under protest provided that the taxpayer could show fraud, oppression, or inadequacy, or the taxes were paid under duress. See *Forest Hill Cemetery Co. v. City of Ann Arbor*, 303 Mich. 56, 5 N.W.2d 564 (1942); *Pere Marquette R. Co. v. City of Ludington*, 133 Mich. 397, 95 N.W. 417 (1903).

<sup>12</sup> See *Consumers Power Co., id.* at 246, 78 N.W.2d at 224.

<sup>13</sup> *Id.* at 245, 78 N.W.2d at 224 (citations omitted).

<sup>14</sup> *Id.* at 245, 78 N.W.2d at 223 (citations omitted).

relief, the court's opinion provides an insight into the general principles of taxation when Section 211.53a was enacted.<sup>15</sup>

Two separate opinions of the court guided the analysis in *Consumers Powers Company*. The first case, *Bateson v. City of Detroit*,<sup>16</sup> involved an assessor who made a mistake about the property description and assessed the taxpayer for land that he did own.<sup>17</sup> The taxing authority provided a legal description of the assessed parcel with the tax bill. However, the taxpayer failed to notice the assessor's mistake, and forwarded payment of the assessed tax to the taxing authority. The court held that a tax voluntarily paid cannot be recovered, and a taxpayer cannot assert a right to recover from a mistake of fact which results from his own neglect to consult the record.<sup>18</sup> The court's holding derives from a long-standing rule that "a tax voluntarily paid cannot be recovered back, and that the taxpayer

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<sup>15</sup> Here, the Court cited to the following cases, *Langford v. Auditor General*, 325 Mich. 585, 39 N.W.2d 82 (1949) and *Bateson v. City of Detroit*, 143 Mich. 582, 106 N.W. 1104 (1906). In *Langford*, a property owner failed to redeem property that was defaulted for failure to pay property taxes. See *Langford*, 325 Mich. at 587-88, 106 N.W.2d at 83. The property was sold to the State of Michigan in May 1942. The auditor general deeded the property to the State of Michigan in June 1943 that was recorded in August 1943. However, the property owner issued a warranty deed to Langford in October 1943 that was recorded in December 1943. In 1944 and 1945, the taxing authority assessed the property to Langford who paid the tax for both years. Further, the property was not sold by the state in the land office board's sale of tax-reverted lands in 1944 and 1945. The court did not accept the taxpayer's argument that an intervening taxing authority, who issues a county treasurer's tax certificate, requires an equitable remedy allowing the taxpayer to secure a redemption. The court stated that "governmental powers of taxation are controlled by constitutional and statutory provisions. . . . Hence it is not possible to adjudicate issues arising under taxation laws by the general application of equitable principles. This phase of the law seems to have been overlooked by plaintiffs who stress their right to relief in the instant case on equitable, rather than legal, grounds." *Id.* at 590-91, 106 N.W.2d at 85.

<sup>16</sup> 143 Mich. 582, 106 N.W. 1104 (1906).

<sup>17</sup> See *id.* at 584, 106 N.W. at 1104-05.

<sup>18</sup> See *id.* at 584, 106 N.W. at 1104.

cannot aver a mistake of fact which results from his own neglect to consult the record . . . .”<sup>19</sup>

The *Bateson* court noted that the taxpayer was privy to all necessary information to reach the conclusion that the assessment was in fact for property not owned by the taxpayer, but the taxpayer’s untimely determination meant that the property taxes were not paid under compulsion or under protest.<sup>20</sup>

The second case used by the *Consumers Powers Company* court to rebut the taxpayer’s asserted principles of equity was *General Discount Corporation v. City of Detroit*.<sup>21</sup> Here, prior to acquisition by General Discounts Corporation, the taxpayer, a foreign corporation, had mistakenly paid taxes on intangible personal property for numerous years by mistake and without duress or protest, and brought an action to recover the excess taxes paid.<sup>22</sup> The court recognized previous case law holding that a foreign corporation’s intangible

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<sup>19</sup> *Id.* at 584, 106 N.W. at 1105 (citing 2 Cooley on Taxation 3d Ed.), p. 1495)). In addition, Cooley Treatise on Taxation provides that a voluntarily assessment or tax paid is unrecoverable even if the underlying law under which the tax is paid is later deemed unconstitutional. 2 Cooley on Taxation 3d Ed., p. 1496-96. Justice Cooley exemplifies this principle by stating that every taxpayer is to know the law, and a taxpayer, who makes a voluntary payment cannot, after payment, plead ignorance of the law to establish a case that the taxing authority should provide a legal remedy. *See id.* at 1496-97. This principle is further true when the taxing authority receiving the money, who has no more knowledge of the law than the taxpayer, is not placed on warning when the taxpayer *fails* to protest the assessment or tax. *See id.* at 1497-98. The court noted that this general rule is “too well cited to require extended citation of authorities.” *Id.* The only citation provided to support these legal propositions by the *Bateson* court is *Manistee Lumber Co. v. Township of Springfield*, 92 Mich. 277, 52 N.W. 468 (1892). In *Consumers Power Company*, the court sets forth the general principal that “it is of the essence of all taxation that it should compel the discharge of the burden by those upon whom its rests . . . .” *Consumers Power Co., id.* at 280, 52 N.W. at 469.

<sup>20</sup> *See Bateson* at 583, 106 N.W. at 1107.

<sup>21</sup> 306 Mich. 458, 11 N.W.2d at 203 (1943).

<sup>22</sup> *See General Discount Corp. v. City of Detroit*, 306 Mich. 458, 461-62, 11 N.W.2d 203, 205 (1943). The taxpayer petitioned the taxing authority, the City of Detroit, for a refund in the amount of \$122,792.11. This amount included the excess taxes paid from 1921 through

personal property was not taxable.<sup>23</sup> However, the court, in denying the taxpayer the requested relief, opined that “protest is unnecessary only where there is some actual or threatened exercise of the power possessed from which the party indebted has no other means of immediate relief than by making payment.”<sup>24</sup> Here, the taxpayer was not under duress when the payment was remitted, hence, protest was a statutory requirement. Section 3444 was the only statutory provision providing a mechanism for the taxpayer to obtain a refund.<sup>25</sup> That provision mandated that to obtain a refund for excessive taxes paid, the taxpayer must make payment of the underlying tax under protest and must sue the township within 30 days of the payment under protest.

The underlying factual thread linking all three cases— *Consumers*, *Bateson*, and *General Discount Corporation*—is two-fold. First, in all three cases, the taxpayer’s payment of the tax was never made under duress. Second, in all three matters, the taxpayer’s payment was never made under protest. It is these two threads that have extraordinary relevance identifying and evaluating the legislative intent regarding the adoption of Section 211.53a.

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1932. The record is void of any reasoning as to why the petition was denied.

<sup>23</sup> See *id.* at 461-62, 11 N.W.2d at 205 (citing *Reliable Stores Corp. v. City of Detroit*, 260 Mich 2 (1932)). In *Reliable*, the city of Detroit taxed the value of the accounts of customers who had purchased merchandise in the Detroit. *Reliable Stores* was incorporate and domiciled in the State of Maryland. The Michigan Court noted that the common law doctrine was that the domicile of the corporation was the domicile of the intangible property unless separated by positive law. See *Reliable Stores Corp. v. City of Detroit*, 260 Mich. 2,3 (1932). When *Reliable Stores Corp.* was decided, the doctrine of business situs recognized the business situs of the property apart from the domicile of the owner. See *id.* However, at this time, Michigan had not accepted this doctrine.

<sup>24</sup> *Consumers Power Co.*, 346 Mich. at 249, 78 N.W.2d at 226 (quoting *General Discount Corporation*, 306 Mich. at 465-66 (1943)).

<sup>25</sup> MCL § 3444 (1929).

The law prior to adoption of Section 211.53a provided that (1) the only statutory provision for refunding excessive taxes required the taxpayer to have made payments under protest and (2) if the taxpayer demonstrated that payment was made under duress, payment under protest was not a requisite to recovery of the excess payments.<sup>26</sup>

## II. JUDICIAL STATUTORY INTERPRETATION OF MCL § 211.53A.

*Remedial statutes are liberally construed to suppress the evil and advance the remedy.*<sup>27</sup>

In 1958 the Michigan Legislature adopted Section 211.53a, and despite the current narrow statutory interpretation opined by the Michigan Tax Tribunal and the Michigan Courts, the language of the statute has remain unchanged.<sup>28</sup> Section 211.53a provides that:

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.<sup>29</sup>

An analysis of the judicial interpretations of Section 211.53a that have been made demonstrates that the Michigan Courts and the Michigan Tax Tribunal have effectively foreclosed a taxpayer's remedial right to obtain a refund for excess taxes paid under this provision. The current judicial interpretation of Section 211.53a is flawed with regret to the most fundamental principles of statutory interpretation. This section will discuss such flawed judicial interpretation as adopted by the Michigan Courts and the Michigan Tax Tribunal.

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<sup>26</sup> See *Consumer Powers Co.*, 346 Mich. at 249, 78 N.W.2d at 227; MCL § 211.53 (1948).

<sup>27</sup> 3 *Sutherland Statutory Construction*, 183 (Norman J. Singer ed., West Group 2001).

<sup>28</sup> See *supra* note 1 and accompanying text.

<sup>29</sup> MCL § 211.53a.

A. Statutory and Judicial Requirements of MCL § 211.53a

1. Party must invoke the jurisdiction of the MTT.

The Michigan Legislature granted the Michigan Tax Tribunal exclusive and original jurisdiction in “a proceeding for refund or redetermination of a tax under the property tax laws.”<sup>30</sup> The Michigan Legislature created the Michigan Tax Tribunal through the Tax Tribunal Act, 1973 PA 186, as amended, MCL 205.701 et seq. Section 53a was enacted in 1893 PA 206, effective September 13, 1958. Therefore, when Section 53a was enacted, it is beyond reason that the Michigan Legislature had envisioned that this statute would be used to dismiss a suit on grounds that “the Tribunal does not have jurisdiction to hear” a Section 53a claim.<sup>31</sup>

The Michigan Tax Tribunal’s belief that Section 53a provides subject matter jurisdiction is clearly erroneous. A remedial statute can include “statutes intended for the correction of defects, mistakes and omissions in the civil institutions and the administration of the state.”<sup>32</sup> Michigan Courts have stated that “a remedial statute is designed to correct an

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<sup>30</sup> MCL § 205.731. In addition, the Michigan Tax Tribunal has jurisdiction in a “proceeding for direct review of a final decision, finding, ruling, determination, or order of any agency relating to assessment, valuation, rats, special assessments, allocation, or equalization, under property tax laws. *Id.*

<sup>31</sup> See e.g., *Daycroft v. City of Ann Arbor*, No. 220434, 1996 Mich. Tax LEXIS 42, at \*11 (MTT June 6, 1984); *Citicorp Information Resources, Inc. v. City of Troy*, No. 111858, 1992 Mich. Tax LEXIS 52, at \*5-\*6 (MTT Oct. 21, 1992); *Linn v. Township of Meridian*, No. 238612, 2003 Mich. App. Lexis 394, at \*1 (Mich. App. Feb. 13, 2003) (“The Tax Tribunal concluded that even though § 53a provides independent ‘subject matter jurisdiction to the Tax Tribunal to correct a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer,’ the Tax Tribunal lacked subject matter jurisdiction in this case.”); and *Ford Motor Co. v. City of Romeo*, MTT Docket No. 288822, Mar. 13, 2002.

<sup>32</sup> 3 *Sutherland Statutory Construction*, 192 (Norman J. Singer ed., West Group 2001) (citing *White v. General Motors Corp.*, 431 Mich. 387 (1988)).

existing law, redress an existing grievance, or introduce regulations conducive to the public good.”<sup>33</sup>

Section 53a provides relief to a taxpayer who has failed to make a payment under protest and asserts a mutual mistake of fact or clerical error.<sup>34</sup> The circumstances surrounding the promulgation of this statute center around the *Consumers Powers* opinion that held that when a taxpayer inadvertently paid excess property taxes because of a mutual mistake, the taxpayer did not remit payment under protest; therefore, the taxpayer would have to assert that it made payment under duress before it had a right to recover.<sup>35</sup> Whether this statute was implemented to correct an existing law, redress an existing law, or introduce regulations conducive to the public good, it is immaterial—it is clear that the legislative body was creating a remedy for the taxpayer.

It is MCL 205.731 that grants jurisdiction to the Michigan Tax Tribunal to hear matters relating to a refund of a tax under the property tax laws.<sup>36</sup> Hence, the Michigan Court’s acknowledgment in the general context that a remedial statute is one that corrects

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<sup>33</sup> *In re School Dist. No. 6, Paris and Wyoming Townships, Kent County*, 284 Mich. 132, 145, 566 N.W.2d 828 (1938); *see also W. Mich. Univ Bd. of Control v. State*, 455 Mich. 531, 545 (1997); *Leonard v. Lans Corp.*, 379 Mich. 147, 155, 150 N.W.2d 746 (1967).

<sup>34</sup> See MCL § 211.53a.

<sup>35</sup> *See Consumers Powers Co.*, 346 Mich at 250-51, 78. N.W.2d at 225. Further, the court recognized that the taxpayer was seeking an equitable remedy, and “it is not possible to adjudicate issues arising under taxation laws by the general application of equitable principles.” *Id.* at 247, 78 N.W.2d at 223.

<sup>36</sup> Section 31 provides that “the exclusive and original jurisdiction shall be (a) [a] proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency related to assessment, valuation, rates, special assessments, allocation, or equalization, under property tax laws [or] (b) [a] proceeding for refund or redetermination of a tax under the property tax laws.” MCL § 205.731.

defects in state law defies the Michigan Tax Tribunal’s alleged power and practice to repeatedly dismiss Section 53a claims because the taxpayer has failed to invoked subject matter jurisdiction. At one time, Michigan Courts were cognizant that a taxpayer could probably invoke the jurisdiction of the Michigan Tax Tribunal through MCL 205.731, by bringing a suit under MCL 211.53, a provision of the General Property Tax Act, allowing a taxpayer to pay the property tax under protest and then file an action against the taxing authority within 30 days.<sup>37</sup> A taxpayer seeking to recover excess payments asa result of either a mutual mistake of fact or clerical error would simply invoke the jurisdiction of the Tax Tribunal in the usual manner through MCL 205.73,1 and then obtain the remedy due if under MCL 211.53a.

2. MTT’s Sua Sponte Dismissal of Matters Where the Parties have Stipulated to a Mutual Mistake of Fact.
  - a. Due Process

The Michigan Tax Tribunal has a history of dismissing a taxpayer’s claim *sua sponte* when it is of the belief that the taxpayer seeking relief under MCL 211.53a has not invoked the jurisdiction of the Michigan Tax Tribunal.<sup>38</sup> However, the Tribunal’s authority to dismiss a matter *sua sponte* is questionable. A thorough reading of the Michigan Tax Tribunal’s Rule

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<sup>37</sup> See *Eyde v. Charter Township of Lansing*, 79 Mich. App 358, 361, 261 N.W.2d 321 323 (1977). Here, the court noted that the Tax Tribunal Act contains provisions “divesting the circuit courts of jurisdiction over suits for a refund. While the General Property Tax Act permits a taxpayer to seek a refund of taxes paid by filing suit in the taxpayer’s local circuit court, MCL 211.53, the Tax Tribunal Act gives exclusive and original jurisdiction to the Tax Tribunal, MCL 205.731.” *Id.* at 368, 261 N.W.2d at 324.

<sup>38</sup> See *Gen. Prod. Del. Corp. v. Leoni Township*, No. 233432, 2003 Mich. App. LEXIS 1095, at \*1 (Mich. App. May 8, 2003); *Colonial Woods Ltd. Dividend Hous. Assoc.*, No. 239199, 2003 Mich. App. LEXIS 1049, at \*1 (Mich. App. June 12, 2003).

of Practice and Procedure will establish that such authority is not conferred by the Rules. However, Michigan Tax Tribunal Rule 205.1111(4) provides that “[i]f an applicable rules does not exist, the 1995 Michigan Rules of Court, as amended, and the provisions of chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being 24.271 to 24.287 of the Michigan Compiled Laws, shall govern.”<sup>39</sup> Yet, the Michigan Tax Tribunal will with reckless authority dismiss a matter *sua sponte* with no concern for the Michigan Court Rules and the Michigan Administrative Procedures Act.<sup>40</sup>

It would appear that dismissal for lack of jurisdiction by the Tax Tribunal is premised on application Michigan Court Rule 2.116(C)(4), providing that a matter may be summarily disposed of under circumstances in which the court lacks jurisdiction of the subject matter.<sup>41</sup> A motion for lack of subject matter jurisdiction is governed by MCR 2.116(B) that requires that a *party* may move for dismissal.<sup>42</sup> When *one party* moves for dismissal, the Michigan Court rules provide that the opposing party is entitled to respond to the motion.<sup>43</sup> A *sua*

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<sup>39</sup> TTR Rules 205.1111(4).

<sup>40</sup> Michigan Court Rule 2.116(I)(1) provides that “if the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.” However, the Michigan Tax Tribunal dismissal *sua sponte* is for want of lack of jurisdiction under Section 53a. The Michigan Tax Tribunal does not speak of genuine issue of material facts, the sole concern is with the lack of jurisdiction being properly invoked by the taxpayer. The following cases illustrate examples when the Michigan Tax Tribunal has dismissed cases because the taxpayer failed to invoke proper jurisdiction. *See e.g. Gen. Prod. Del. Corp. v. Leoni Township*, No. 233432, 2003 Mich. App. LEXIS 1095, at \*1 (Mich. App. May 8, 2003); *Colonial Woods Ltd. Dividend Hous. Assoc.*, No. 239199, 2003 Mich. App. LEXIS 1049, at \*1 (Mich. App. June 12, 2003); *Linn v. Township of Meridian*, No. 238612, 2003 Mich. App. LEXIS 394, at \*1 (Mich. App. Feb. 18, 2003).

<sup>41</sup> MCR 2.116(c)(4).

<sup>42</sup> MCR 2.116(B)(1).

<sup>43</sup> MCR 2.11(G)(1)(a)(ii).

*sponte* dismissal by the Tribunal does not afford a taxpayer certain procedural requisites—viz., a response to the motion,—as required by the Michigan Court Rules.

The Tribunal’s practice of dismissing a Section 53a claim for refund on its own motion, without notice to the claimant, constitutes irreprehensible error in that the taxpayer is not accorded procedural due process. “The due process clauses of the United States and Michigan Constitution apply when government action deprives a person of a liberty or property interest.”<sup>44</sup> Michigan Courts have further required that “when any court contemplates sua sponte summary disposition against a party, that party is entitled to unequivocal notice of the court’s intention and a fair chance to prepare a response.”<sup>45</sup> The Tax Tribunal’s practice of *sua sponte* dismissal denies the party both notice and an opportunity to respond. The circumstances bear a striking similarity to those of *Haji v. Prevention Insurance Agency, Inc.*<sup>46</sup> In that case, on the day set for trial, the trial judge “suggested tying up some ‘loose ends,’ and invited argument” on an issue raised spontaneously by the court.<sup>47</sup> The record is devoid of any mention of the issue raised by the

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<sup>44</sup> See *Petrus v. Dickinson County Bd. of Comm’r*, 184 Mich. App. 282, 292, 457 N.W.2d 359 (quoting *Blue Cross & Blue Shield of Mich. v. Comm’r of Ins.*, 155 Mich. App. 723, 731-32 (1986)).

<sup>45</sup> *Haji v. Prevention Insurance Agency, Inc.*, 196 Mich. App. 84, 90, 492 N.W.2d 460 (1992).

<sup>46</sup> 196 Mich. App. 84, 492 N.W.2d 460 (1992).

<sup>47</sup> See *id.* at 86, 492 N.W.2d at 461. The plaintiff’s cause of action was sounded in breach of contract and negligence resulting from a work related injury when the plaintiff, who owned a market, was unloading a delivery truck for a corporation, in which he was an agent. The core issue revolved around an alleged oral agreement between an insurance carrier and the corporation. The initial insurance agreement excluded the plaintiff from the workers’ compensation insurance policy. Later, the plaintiff, majority shareholder for corporation alleges that an oral agreement existed between the insurance company and the corporation that would provide coverage for the plaintiff. The trial judge in “tying up the loose ends” invited oral

court in the parties’ motions and briefs, yet on its own initiative, the action was dismissed on the basis of these “loose ends.”<sup>48</sup> In a concurring opinion, Justice Corrigan notes that the Michigan Court rules provide for specific procedures on motion practice, but are *silent* on the trial court’s authority to grant summary disposition on the court’s own motion on legal theories propounded by the judge.<sup>49</sup> It is unlikely that the drafter contemplated such a practice which can be supported by the Michigan Court rules requiring an opponent’s motion for summary disposition not take place until 28 days after service.<sup>50</sup> “A court which fails to afford that constitutionally rooted courtesy [of notice and intent] has no authority to grant summary disposition”<sup>51</sup>

The Sixth Circuit Court of Appeals has addressed such summary, due process—denying judicial decision making. In *Employers Insurance of Wausau v. Petroleum Specialties, Inc.*<sup>52</sup>, The court acknowledges that the United States Supreme Court has held that “district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party *was on notice that she had to come forward with all of*

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arguments on the issue of consideration, yet neither party had briefed this issue and no motion existed on this issue before the court. After hearing arguments on the *sua sponte* issue of lack of consideration, the trial judge ruled that the only possible consideration was detrimental reliance, but that no reasonable jury could find reasonable reliance.

<sup>48</sup> See *id.* at 86-87, 492 N.W.2d at 462-63.

<sup>49</sup> See *id.* at 89, 492 N.W.2d at 464 (concurring J. Corrigan).

<sup>50</sup> See *id.*; see also MCR 2.116(B)(2) (A motion for summary disposition at any time consistent with the Michigan Court Rules, “but the hearing on a motion brought by a party asserting a claim shall not take place until at least 29 days after the opposing party was served with the pleading stating the claim.”)

<sup>51</sup> See *Haji* 196 Mich. App. at 90, 492 N.W.2d at 464.

<sup>52</sup> 69 F.3d 98 (6th Cir. 1995).

her evidence.”<sup>53</sup> The Sixth Circuit, however, has never given the district courts a carte blanche authority to dismiss action *sua sponte*.<sup>54</sup>

To the contrary, in *Employers Insurance of Wausau*, the Sixth Circuit held that the district court abused its discretion when it granted summary judgment *sua sponte* when the party was not given notice, and the party made a facially valid claim that issues of fact existed.<sup>55</sup> The court placed special emphasis on the fact that a factual dispute existed as presented by the documents.<sup>56</sup>

Finding that the district court abused its discretion, the court noted that when a party appeals the *sua sponte* summary disposition, the Court of Appeals is forced to serve as “a sounding board for facts not properly in the record, simply because a party never had a chance to develop them.”<sup>57</sup> When a court does not develop the record, the court may be obligated to review the entire record to resolve any disputed questions of fact that were never advanced by the party. For this reason, a *sua sponte* summary disposition is undesirable unless the parties have been afforded notice and a reasonable opportunity to respond to all the issues to be considered by the court.<sup>58</sup> Absent compliance with the notice requirement and provision to

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<sup>53</sup> *Employers Ins. of Wausau v. Petroleum Specialties, Inc.*, 69 F.3d 98 (6th Cir. 1995) (quoting *Celotex Corp. v. Catrett*, 471 US 317, 326 (1986) (emphasis added)).

<sup>54</sup> *See Employers Ins. of Wausau*, 69 F.3d at 105 (“granting of summary judgment *sua sponte* is ‘a practice we discourage.’” (quoting *Beaty v. United States*, 937 F.2d 288 (6th Cir. 1991))).

<sup>55</sup> *See id.* at 106.

<sup>56</sup> *See id.*

<sup>57</sup> *See id.* at 105.

<sup>58</sup> *See id.*; *see also Routman*, 873 F.2d at 971, *Portland Retail Druggists Ass’n v. Kaiser Foundation Health Plan*, 662 F.2d 641, 645 (9th Cir. 1981). For the proposition that the motion for summary disposition be served at least 10 days before the summary judgment is entered. *See Routman*, 873 F.2d at 971; *Beck v. Borden*, 724 F.2d 44 (6th Cir. 1984)

the parties of an opportunity to respond to the issues to be addressed by the court, the court's authority to grant summary judgment is foreclosed.<sup>59</sup>

The Sixth Circuit's reasoning in *Employers Insurance of Wausau* speaks directly to the procedural deficiencies in the Michigan Courts and the Tax Tribunal in allowing the Tax Tribunal to continue to *sua sponte* dismiss a party's action without affording it notice and a reasonable chance to respond to all issues to be considered by the Tax Tribunal. Subsequent to dismissal, a party's recourse is either to file a motion for reconsideration with the Michigan Tax Tribunal, or to proceed with an appeal to the Michigan Court of Appeals.<sup>60</sup> If the party chooses the latter option, the record is devoid of a party's complete evidentiary record, as the party has not been afforded the opportunity to develop the record. This is just one of the reasons why the Sixth Circuit believes it is impossible for the Court of Appeals to review a record and determine if the question of fact was properly decided.

This issue is not one of first impression for Michigan Courts. In *Brooks v. General Motors Corp.*,<sup>61</sup> the Michigan Court of Appeals addressed whether the trial court had improperly decided an issue *sua sponte*.<sup>62</sup> In reversing the trial court's action, the court stated that "the practice [of *sua sponte* dismissal] is not encouraged, [and] it may be appropriate where no material facts are in dispute and where the party opposing summary disposition had the opportunity to respond to the trial court's proposed resolution of the case."<sup>63</sup> The court also

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<sup>59</sup> See *Employers Insurance of Wausau*, 69 F.3d at 105; see also *Kistner v. Califano*, 579 F.2d 1004, 1005 (6<sup>th</sup> Cir. 1978); *Routman*, 873 F.3d at 971.

<sup>61</sup> No. 209701, 2000 Mich. App. LEXIS 2787, at \*1, (Mich. App. Jan. 7, 2000).

<sup>62</sup> See *id.* at \*3.

<sup>63</sup> See *id.* at \*3-\*4 (citing *Haji*, 196 Mich. App. at 84, 88-90).

noted that because the parties were not afforded the opportunity to develop the record in the court, the Court of Appeals was unable to review meaningfully the trial court's decision.<sup>64</sup> The Michigan Court of Appeal's reasoning in *Brooks*, carries a striking resemblance to the Sixth Circuit's reasoning in *Employers Insurance of Wausau*; however, inexplicably, the Michigan Court of Appeals has failed to apply this same reasoning when the Tax Tribunal oversteps its judicial authority in dismissing a taxpayer's matter *sua sponte* where the taxpayer is not afforded notice or an opportunity to brief or otherwise address the issue.<sup>65</sup>

b. MTT's Evidentiary Hearing and the MAPA

MCL 211.53a provides the taxpayer with an opportunity to recover excess taxes paid for to either a mutual mistake of fact or clerical error.<sup>66</sup> It is through the Michigan Administrative Procedures Act that the Michigan Tax Tribunal imposes a legal right upon the taxpayer to present evidence and argument on issues of fact.<sup>67</sup>

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<sup>64</sup> See *id.* at \*5 (citing *Westfield Co. v. Grand Valley Health Plan*, 224 Mich. App. 385, 387 (1997)).

<sup>65</sup> See *e.g.*, *Morrill v. St. Joseph County*, Nos. 217365, 217420, 2001 Mich. App. LEXIS 28, at \*1 (Mich. App. Dec. 11, 2001). In a consolidated opinion, both the State of Michigan and the St. Joseph County Road Commission appeal the trial courts *sua sponte* ruling without a hearing or notice that a portion of a street was abandoned and that summary disposition should have been granted in the plaintiff's favor. See *id.* at \*2. When the trial court made its *sua sponte* ruling, neither party was afforded notice nor provided with the opportunity to brief the issue, and all the parties were under the assumption that the matter was going to trial. The issue before the court had not been briefed and notice was not provided. See *id.* The court remanded the issue to the trial court to allow the parties to be given notice and an opportunity to be heard. See *id.* at \*4. The Michigan Court of Appeals, again, quoted Justice Corrigan's *Haji* concurring opinion "a court that fails to afford that constitutionally rooted courtesy [notice and an opportunity to be heard] had no authority to grant summary disposition." See *id.* (quoting *Haji*, 196 Mich. App. at 90).

<sup>66</sup> See MCL § 211.53a.

<sup>67</sup> See *Herald Co. v. Tax Tribunal*, No. 234625, 2003 Mich. App. LEXIS 1909, at \*13-814, (Mich. App. Aug. 12, 2003). "The MTT, by its own rule, is bound by the Michigan Rules

The Tax Tribunal Act provides that the “tax tribunal is created and is a quasi-judicial agency which for administrative purposes only, is in the department of treasury.”<sup>68</sup> Further, MCL 205.726 provides that “hearings . . . shall be conducted pursuant to [the Michigan Administrative Procedures Act.]”<sup>69</sup> Under the provisions of the Michigan Administrative Procedures Act, a party shall be given the opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and arguments on issues of fact.<sup>70</sup>

In *American Community Mutual Insurance Company v. Commissioner of Insurance*,<sup>71</sup> Respondent, the Commissioner of Insurance, appealed the order remanding the matter for an evidentiary hearing and vacating an earlier order by the commissioner.<sup>72</sup> American Mutual Insurance Company submitted an insurance form to the Insurance Bureau. Ultimately, the form was rejected based on an unfair trade practice that was in violation of MCL 500.2027.<sup>73</sup>

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of Court, as well as by §§ 71-87 of the Administrative Procedures Act (APA, MCL 24.201 *et seq.*, in all cases and proceedings before it whenever an applicable tax tribunal rule does not exist on the subject. *Id.* at \*13-14 (citing TTR 205.1111). The specific language of TTR 205.1111 provides that “if an applicable entire tribunal rule does not exist, the 1995 Michigan Rules of Court, as amended and the provisions of chapter 4 of Act No. 306 of the Public Acts of 1969, as amended, being 24.271 to 24.287 of the Michigan Compiles Laws, shall govern.” TTR 205.1111(4).

<sup>68</sup> MCL § 205.721.

<sup>69</sup> See *e.g.*, *Vomvolakis v. Dep’t of Treasury*, 145 Mich. App. 238, 377 N.W.2d 309 (1985); *City of Troy v. Cleveland Pneumatic Tool Co.*, 109 Mich. App. 361, 311 N.W.2d 782 (1981).

<sup>70</sup> See MCL § 24.272.

<sup>71</sup> 195 Mich. App. 351, 491 N.W.2d 597 (1992).

<sup>72</sup> See *Am. Comty. Mut. Ins. v. Comm’r of Ins.*, 195 Mich. App. 351, 353, 491 N.W. 2d 597, 598 (1992).

<sup>73</sup> See *Am. Comty. Mut. Ins.*, 195 Mich. App. at 354, 491 N.W.2d at 598. The insurance form asked whether the applicant was previously declined for health or life insurance. Further, the form stated that any denial for health or life insurance subsequent to the filing of this form

Through a myriad of administrative decisions, the insurance commissioner denied the petitioner's request for an evidentiary hearing on the issue because the petitioner's form was disapproved by the Insurance Bureau's staff.

Ultimately, the Court of Appeals affirmed the decision denying the petitioner an evidentiary hearing. Yet, the court's reasoning provides support for a determination that the Tax Tribunal's *sua sponte* dismissal of a MCL 211.53a clerical error or mutual mistake of fact suit violates fundamental procedural due process principles. In *American Community Mutual Insurance Company*, the Court of Appeals reasoned that because all the relevant facts necessary for a final decision were already part of the record presented to the commissioner, the requirements of MCL 24.272(3) were met in this case.<sup>74</sup> In delineated contrast, the taxpayer whose case is dismissed by the Tax Tribunal by a *sua sponte* order is denied the procedural opportunity to present *any* facts to the Michigan Tax Tribunal.

In *American Community Mutual Insurance Company*, the evidentiary record was sufficiently supported by arguments presented on the motion for summary dismissal made in front of a hearing referee.<sup>75</sup> The precise verbiage of the court was that "the language in the form could not be disputed, and other allegations of disputed facts were superfluous."<sup>76</sup> The parties were "afforded due process protection, because they were provided with the opportunity for oral argument before the hearing referee with regard to the motion for

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will be denied insurance through American Community Mutual Insurance Co. *See id.* at 354-55, 491 N.W.2d at 598-99. This practice resulted in the allegations of unfair trade practices pursuant to MCL 500.2027. *See id.*

<sup>74</sup> *See* 195 Mich. App. at 361-62, 491 N.W.2d at 602.

<sup>75</sup> *See* 195 Mich. App. at 356, 491 N.W.2d at 599.

<sup>76</sup> 195 Mich. App. at 363, 491 N.W.2d at 602.

summary decision.”<sup>77</sup> Again, contrasting the Court of Appeal’s reasoning, the taxpayer is not accorded any opportunity to provide a hearing referee or any tribunal member with argument or evidence of the disputed facts, even if later determined superfluous.

In *Smith v. Lansing School District*, the Michigan Supreme Court reversed a Michigan Court of Appeals decision mandating a full evidentiary hearing pursuant to the Michigan Procedures Administrative Act.<sup>78</sup> Yet, the Michigan Supreme Court did not foreclose a party from receiving a full evidentiary hearing. The Michigan Supreme Court stated that “we construe that portion of § 72(3) to require affording the opportunity to present evidence on issues of fact only when such issues exist.”<sup>79</sup> Thus, the Michigan Tax Tribunal’s *sua sponte* dismissal of a Section 211.53a claim disregards the Michigan Supreme Court’s holding in *Smith*.

The statutorily-conferred opportunity for a taxpayer to recover taxes paid as a result of either a mutual mistake of fact or a clerical error implies a mechanism or some means by which a taxpayer can demonstrate existence of the clerical error or the existence of such a mutual mistake. The Michigan Tax Tribunal is the statutorily-designated administrative agency through which such claims under Section 211.53a are made. It is through MCL

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<sup>77</sup> *Id.*

<sup>78</sup> *See Smith v. Lansing Sch. Dist.*, 428 Mich. 248, 259-60, 406 N.W.2d 825, 830 (1987). The appeal arises out of the administrative procedure in the Michigan Employment Relations Commission. Non-union bargaining member employed by the Lansing School District and Lansing Schools Education Association filed an unfair labor practice charge with the Michigan Employment Relations Committee.

<sup>79</sup> *See id.* at 256-57, 406 N.W.2d at 829 (1987). Section 72(3) of the MAPA states that “the parties shall be given an opportunity to present oral and written arguments on issues of law and policy and an opportunity to present evidence and argument on issues of fact.”

205.746 that parties may submit evidence, and this provision also requires that the Michigan Tax Tribunal shall make its decision in writing. When a taxpayer raises a Section 211.53a claim, the underlying issue is whether excess taxes have been paid as a consequence of either a clerical error or a mutual mistake of fact. Under either of the underlying issues, establishes that the taxpayer will assert an issue of fact in its pleadings and arguments.<sup>80</sup> Such factual issues will be only a scant possibility would show that the issue is not one of fact. Thus, the Michigan Tax Tribunal is acting contrary to *Smith* and *American Mutual Insurance Company*.

B. Defining Mutual Mistake of Fact

The Michigan Tax Tribunal has consistently erred in interpreting MCL § 211.53a, a statutory provision that has a clear and established meaning.<sup>81</sup> The genius of the error is the

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<sup>80</sup> While the following list is not exclusive, it provides an understanding of the factual issues that the taxpayer will need to demonstrate to the court: what was the understanding of the taxpayer as to the nature, character, or extent of its property when it was preparing its property statement for filing with the assessing jurisdiction; what did the taxpayer understand as to the nature, character, or extent of the property when it filed its property statement; had the assessor ever reviewed, inspected, or even assessed, the subject property prior to the filing of the taxpayer's property statement; what was the assessor's understanding, if any, prior to the filing of the property statement by the taxpayer with respect to the nature, character, or extent of the subject property; what was the assessor's understanding of the nature, character, and extent upon reviewing and adopting the property statement. These specific questions of fact require the taxpayer to provide evidentiary support.

<sup>81</sup> See *Gen. Prod. Del. Corp v. Township of Leoni*, No. 249550, 2001 Mich. Tax LEXIS 4, at \*46 (Mich. Tax Tribunal Mar. 9, 2001). The Michigan Tax Tribunal flagrantly ignores an established meaning of mutual mistake of fact and proceeds to notes that "while the Tribunal is of the opinion that, while there is some case law on mutual mistake, there is no case law which defines 'mutuality' solely within the context of MCL § 211.53a." *Id.* at \*46. The Michigan Tax Tribunal proceeded to take the verbiage of MCL § 211.53a word-for-word and interpret the exact meaning. See *id.* at \*46-\*62. Of great import is the interpretation of 'mutual mistake,' the Michigan Tax Tribunal's floundering interpretation fails to ignore codification of the concept that "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

Michigan Tax Tribunal’s decision in *General Products*. Here, the Michigan Tax Tribunal went to enormous lengths to produce anew a meaning of ‘mutual mistake’ that is contrary to all previous judicial interpretations. The Tax Tribunal concluded that “mutuality must be present at both the level of referenced fact and mistaken belief.”<sup>82</sup> The interpretation by the Michigan Tax Tribunal is flawed for various reasons. First, mutual mistake has been defined in binding Michigan Court of Appeals decisions. Second, the Michigan Tax Tribunal in *General Products* failed to provide any support for the proposition that the statutory language was ambiguous, instead the Michigan Tax Tribunal nonchalantly stated that “the meaning and application of the word ‘mutual and the phrase ‘mutual mistake’ are the pivotal points in understanding the statutory language, ” and then proceeded to search out the dictionary definition of mutual and mistake preceding a discussion of case law referencing mutual mistake.<sup>83</sup>

Michigan Courts have spoken on several occasions regarding the meaning of ‘mutual mistake of fact.’ *Shell Oil Company v. Estate of Kert*,<sup>84</sup> a contract case, addressed the issue of the ground upon which a party may rescind a contract under the doctrine of mutual mistake of fact.<sup>85</sup> On appeal, the issue was whether an amended lease could be rescinded under the

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such peculiar and appropriate meaning.” MCL § 8.3a.

<sup>82</sup> *See id.* at \*59.

<sup>83</sup> *Id.* at \*53. The long understanding premise that “a statute, clear, and unambiguous on its face, need not and cannot be interpreted by a court and that only statutes which are of doubtful meaning are subject to the process of statutory interpretation.” 21 *Sutherland Statutory Construction*, 45 (Norman J. Singer ed., West Group 2000).

<sup>84</sup> 161 Mich. App 409, 411 N.W.2d 770 (1987 Mich.).

<sup>85</sup> *See Shell Oil Co.*, 161 Mich. App. at 413, 411 N.W.2d at 771-72. Here, Shell Oil Company had leased property from Ben and Esther Kert. Following the death of Ben Kert, Esther Kert amended the lease extending the terms. The Oakland Road Commission contacted

doctrine of mutual mistake of fact.<sup>86</sup> The Court discussed the two requirements for rescission of the amendment in the context of a mutual mistake of fact. First, “there must have been a belief by one or both of the parties not in accord with the facts.”<sup>87</sup> Here, the Court commented that there was scant support for a belief by either party that was not accord with the facts.<sup>88</sup> If Shell Oil Company had conducted a title search, there could be not mistaken belief on its part, and since Esther *did not testify*, her mistaken belief has no evidentiary support.<sup>89</sup> Second, the

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the person representative of Ben Kert’s estate to discuss an interest in the property as part of a road widening project. Subsequent to this communication, the personal representative contacted the lessee to discuss renewing the expired lease. The extension of the lease by Esther Kert raises the issue of whether the amendments to the lease can be extended under the doctrine of mutual mistake of fact. *See* 161 Mich. App at 411-16, 411 N.W.2d at 771-73.

<sup>86</sup> *See* 161 Mich. App at 416, 411 N.W.2d at 773.

<sup>87</sup> *See* 161 Mich. App at 421, 411 N.W.2d at 775.

<sup>88</sup> *See id.*

<sup>89</sup> *See id.* The court stated that “since Esther has not testified, it is equally difficult to find record support for defendant’s claim that Esther believed she was tenant by the entirety.” The import of this statement in the context of a Section 53a claim, further supports the argument that the Tax Tribunal’s *sua sponte* dismissal erroneously fails to provide the taxpayer with the opportunity to develop the record with evidentiary support as to the mutual mistake of fact. While this paper does not discuss the procedural context of a stipulation between a taxpayer and a taxing authority, the Michigan Tax Tribunal has created a “sample stipulation” that while not required, may be used in the context of a Section 53a claim. This stipulation is available at [http://www.michigan.gov/documents/cis\\_tax\\_stip53a\\_34287\\_7.pdf](http://www.michigan.gov/documents/cis_tax_stip53a_34287_7.pdf).

The Tax Tribunal through the Tax Tribunal Act was granted the power to promulgate rules for the implementation of the Tax Tribunal Act, including rules for practice and procedure before the tribunal. *See* MCL § 205.732. The Tax Tribunal Rules provide that “for purposes of this rule [motions], a stipulation requiring action by the tribunal is treated as a motion.” TTR 205.1230. While standing alone, this rule does not appear to restricting in the taxpayer’s ability to advance a Section 53a claim. Yet, the Tax Tribunal’s web page enumerates an extensive list of requirements for parties stipulating on an issue. The final item listed provides that for “property tax appeals, a specific explanation of the clerical error and/or mutual mistake of fact for stipulations filed under MCL 211.53a”

[http://www.michigan.gov/cis/0,1607,7-154-10576\\_17489\\_17493-42609--,00.html](http://www.michigan.gov/cis/0,1607,7-154-10576_17489_17493-42609--,00.html). A final note regarding stipulations is that the Tax Tribunal will not enter an order or judgment on a Section 53a stipulation that does not provide a specific explanation of the clerical error and/or mutual mistake of fact. In such cases when the parties have not articulated specific explanations, the

erroneous belief must relate to a basic assumption of the parties upon which the contract was made, and which materially affects the agreed performance of the parties.<sup>90</sup> Here, contra to a discussion of this second prong, the Court footnoted to an earlier case, *Dingeman v. Reffitt*<sup>91</sup>, in which the Court illustrated an example of the second prong. The facts surrounding *Dingeman* involved a land contract and the issuance of a permit for an on-site septic tank and the soil composition evaluation of the property.<sup>92</sup> When the parties entered into the contract, they were under the mistaken belief that the soil composition was such that a septic tank permit would not be permitted. However, after the parties had executed the contract and the title transferred ownership of the property, it was discovered that the soil composition of the tract of the property would support a septic tank, thus a septic tank permit was issued by the health department.<sup>93</sup> Concluding that the parties were of an erroneous belief, the Court stated that “when the parties entered into the land contract they were laboring under a mutual mistake of fact.”<sup>94</sup> Thus, the courts in *Shell Oil Company* and *Dingeman* have accepted a

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Tax Tribunal will either require a hearing or written explanation. The Tax Tribunal’s position regarding stipulations seems contrary to the general proposition that a remedial statute, such as MCL § 211.53a, should be liberally construed for the advancement of the remedy. *See Sparks v. Auditor General*, 292 Mich. 58, 290 N.W. 327 (Mich. 1940); *Maier v. Gen. Tele. Co. of Mich.*, 466 Mich. 879, 645 N.W.2d 654 (2002) (remedial statutes are to be given preferential treatment, unless a “legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case.” (citations omitted)); *see also* 3A *Statutes and Statutory Construction*, §66.07, Norman J. Singer 5<sup>th</sup> Ed, (West Group 1992) (“Statutory provisions establishing remedies so that the taxpayer may recover taxes unjustly collected have generally been liberally construed.”).

<sup>90</sup> *See Shell Oil Co.*, 161 Mich App. at 421-22, 411 N.W.2d at 775.

<sup>91</sup> 152 Mich. App. 350, 393 N.W.2d 632 (1986).

<sup>92</sup> *See Dingeman*, 152 Mich. App at 355-56, 393 N.W.2d at 634-35.

<sup>93</sup> *See id.*

<sup>94</sup> 152 Mich. App at 356; 393 N.W.2d at 634.

well-established and unambiguous definition of what constitutes a mutual mistake of fact.<sup>95</sup>

This definition has never required that either party provide evidence establishing the mutual mistake of fact when alleging a mutual mistake of fact in pleadings.

Previous cases involving mutual mistake of fact in the context of Section 53a claims is

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<sup>95</sup> While unpublished opinions are not binding on the Michigan Tax Tribunal, two unpublished opinions provide additional support for the holding in *Shell Oil Company* and *Dingeman*. In *Atkinson v. City of Detroit*, No. 199537, 1999 Mich App. LEXIS 1158, at \*1 (Mich. App. June 25, 1999), the petitioner, acting on behalf of himself and others similarly situated, appealed an order from the Michigan Tax Tribunal dismissing their Section 53a claim for a refund for tax paid under a mutual mistake of fact. *See id.* at \*1-\*3. Here, the Court stated that “we disagree . . . with the Tax Tribunal’s conclusion that petitioners did not establish payment based on a ‘mutual mistake of fact.’ Under principles of contract law, a ‘mutual mistake’ requires a belief by one or both of the parties not in accord with the facts, an the erroneous belief must relate to a basic assumption of the parties upon which the contract is made and which materially affects the agreed performances of the parties.” *Id.* at \*6-\*7 (citing *Shell Oil Co. v. Estate of Kert*, 161 Mich. App. 409, 421-22, 411 N.W.2d 770 (1987)). While the Court imported the definition of mutual mistake of fact from *Shelly Oil Company*, the Tax Tribunal’s decision was affirmed because there was only harmless error which was nonprejudicial to the taxpayers. *See id.* at \*8.

The Tax Tribunal in *General Products* held that mutual mistake of fact required that mutuality be present. *See supra* note 75 and accompanying text. This holding is based on the notion that property tax case law “offers two good examples of clearly discernible mutual mistake” from contract law. *See Gen. Prod. Del. Corp.* at \*59. The Tax Tribunal’s second illustrative example involves *Atkinson*, where the taxpayers and the authority both contemplated the same mistaken fact. The Tax Tribunal stated “in that instance, both parties referenced and contemplated the same fact, the boundary line between municipalities, and formed the same mistaken belief concerning that fact.” *Id.* Yet, the Tax Tribunal egregiously ignored the Michigan Court of Appeal’s definition of mutual mistake of fact that did not require mutuality.

The second unpublished opinion is *Klint v. Carlson*, No. 224488, 2001 Mich. App. LEXIS 1966, at \*1 (Mich. App. Oct. 12, 2001). Here, the defendant appeals the trial court order granting plaintiff’s motion for summary disposition. The defendant asserted as one of the appealable grounds is that the trial court erred by refusing to void the contract under the doctrine of mutual mistake of fact. *See id.* at \*2-\*3. The Court, again, imported the language from previous case law stating that a contract can be rescinded when the parties are mutually mistaken about a basic assumption upon which the contract was made and which materially affected the agreed performance of the parties. *See id.* at \*3 (citing *Shell Oil Company v. Estate of Kert*, 161 Mich. App. 409, 421-22, 411 N.W.2d 770 (1987)). The Court concluded that a mutual mistake of fact had occurred, but denied recession upon other grounds of equity.

of little assistance in addressing the definition of the term “mutual mistake of fact.” When the Michigan Court of Appeals addressed the mutual mistake of fact in *General Products*, it restricted from the import of contract-based case law and the definition of “mutual mistake” found therein.<sup>96</sup> Instead, the Court was guided by the Tax Tribunal’s presentation of three contract cases that involved examples of mutuality between both parties, thus incorporating a flawed definition of mutual mistake.<sup>97</sup> A review of the trio of cases cited by both the Tax Tribunal and the Michigan Court of Appeals establishes that while mutuality existed between both parties, in *Lenawee County Board of Health*, the Michigan Supreme Court stated that a contractual mistake ‘is a belief that is not accord with the facts.’<sup>98</sup> The erroneous belief “of one or both of the parties must relate to a fact in existence at the time the contract is executed.”<sup>99</sup> Thus, with resounding clarity, the Michigan Supreme Court has provided a definition of mutual mistake of fact that the Tax Tribunal and the Michigan Court of Appeals atrociously overlooked to reach their unfounded conclusion in *General Products* that mutuality requires both parties to have a mistaken belief.

In *General Products*, the Tax Tribunal used the legal dictionary definition of mutual

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<sup>96</sup> See *Gen. Prod. Del. Corp.* at \*10-\*11.

<sup>97</sup> See *id.* The Court cites three cases for the proposition requiring mutuality between both parties. See *Harris v. Axline*, 323 Mich. 585, 36 N.W.2d 154 (1949); *Gordon v. City of Warren Planning and Urban Renewal Comm.*, 388 Mich. 82, 199 N.W.2d 465; and *Lenawee County Bd. of Health v. Messerly*, 417 Mich. 17, 331 N.W.2d 203 (1982).

<sup>98</sup> *Lenawee County Bd. of Health* at 24, 331 N.W.2d at 207 (citing 1 Restatement of Contracts, 2d § 151). In the Tax Tribunal’s *General Product* decision, the Tax Tribunal reaches a mutuality requirement by both parties through the legal definition of mutual mistake. The Tax Tribunal uses Black’s Law Dictionary and notes that the context of mutual mistake involves a meeting of the essential elements of a contract is mutual agreement and assent of parties to contract. See *Gen. Prod. Del. Corp.* at \*54.

<sup>99</sup> *Id.* (citations omitted).

mistake to interpret the mutuality requirement.<sup>100</sup> Black's Law Dictionary provides two definitions of "mutual mistake." The second definition states that "mutual mistake with regard to contract, justifying reformation, exists where there has been a meeting of the minds of the parties and an agreement actually entered into but the agreement in its written form does not express what was really intended by the parties." Black's Law Dictionary 6<sup>th</sup> Ed. 1991, page 1021. Thus, it seems that the Tax Tribunal is correct in its belief that, when the parties entered into the agreement, there must have been a meeting of the minds. This would be true in the context of a Section 53a claim. When the taxpayer submitted payment to the taxing authority, both parties were of the belief that the tax bill was correct. However, it is only later that the agreement or the tax bill does not express the true intent of the parties. For example, when a taxpayer later realizes that a charitable exemption exists for property of nonprofit charitable institutions, it is at this time that the tax does not accurately express what was really intended by the parties.<sup>101</sup> Logically, there would not be mutuality in this situation because the taxing authority would have issued an exemption for the property. For the Tax Tribunal to require mutuality in the mistaken belief would almost completely foreclose the opportunity for any taxpayer to obtain a key remedial relief for taxes not paid under protest. Further, this unduly restrictive mutuality requirement seems contrary to the historical context in which the

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<sup>100</sup> The legal definition used states that "as justifying reformation of an instrument is one common to both or all the parties, where each party labors under the same misconception respecting a material fact, the terms of the agreement, or the provision of a written instrument designed to embody such an agreement." Black's Law Dictionary 6<sup>th</sup> Ed. 1991, page 1021.

<sup>101</sup> MCL § 211.7o governs the exemption for property of nonprofit charitable institutions. "Property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which it was incorporated is exempt from the collection of taxes under this act." MCL § 211.7o(1).

Michigan Legislature adopted MCL § 211.53a.<sup>102</sup> No question exists but that *Consumers Power Company* is indicitive of the Michigan Legislature’s intent. This provides resounding support for concluding that mutuality does not require the narrow interpretation so afforded by the Tax Tribunal.<sup>103</sup>

C. *In Pari Materia.*

1. Requirements

The doctrine of *in pari materia*, long recognized by the Michigan Court applies to “statutes ... [that] relate to the same person or things, or the same class of persons or things, or which have the common purpose.”<sup>104</sup> *In pari materia* provides for statutory interpretation “in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no

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<sup>102</sup> In *Consumers Power Company*, 346 Mich. at 246; 78 N.W.2d at 224, the taxpayer had received and paid tax statements. Ultimately, the taxpayer had remitted over \$30,000 in excess property tax payments. When this case was decided, the only statutory provision allowing a refund for excess taxes paid required that the taxes be paid under protest. It was through the eyes of this holding that the Michigan Legislature enacted Section 53a of the General Property Tax Act. The argument advanced was that the mutual mistake existed when the taxing authority figured the tax, and the tax payer failed to notice the error.

<sup>103</sup> Additional support for the finding of a mutual mistake when the sequence of events is such that one party commits a mistake and then the other party adopts the mistake is demonstrated through Michigan case law. *See Lake Gogebic Lumber Co. v. Burns*, 331 Mich. 315, 49 N.W.2d 310 (1951) (The seller believed and represented that certain property contained ten-million log feet of timber, but it actually contained only one million five hundred thousand log feet of timber. The seller’s belief was accepted by the buyer. This factual sequences was determined to be a mutual mistake of fact.); *see also* *Montgomery Ward & Co. v. Williams*, 330 Mich. 275, 47 N.W.2d 607 (1951) (When a party is negligent in not ascertaining the fact, this will make no difference because mistake of fact usually arises from lack of investigation.).

<sup>104</sup> *State Treasurer v. Schuster*, 456 Mich. 408, 417, 572 N.W.2d 628, 632 (1998).

reference to the other.”<sup>105</sup> The Courts have imposed various requirements when using the doctrine of *in pari materia*. First, the Michigan Supreme Court held that *in pari materia* has been determined to be an “interpretive aid . . . that can only be utilized in a situation where the section of the statute under examination is itself ambiguous.”<sup>106</sup> Second, statutes *in pari materia* are those that “relate to the same person or thing, or the same class of persons or things, or which have a common purpose.”<sup>107</sup> The statutory interpretation of the two statutes should lend themselves to construction that avoids conflict and gives effect to each statute without being repugnant, absurd, or unreasonable.<sup>108</sup>

The doctrine of *in pari materia* has been applied by the Michigan Courts to Sections 53a and 53b. The Michigan Legislature enacted a second remedial statutory provision Section 53b, allowing the local taxing authority to correct improper tax exactions when a clerical error or a mutual mistake of fact exists.<sup>109</sup> The precise language of Section 53b provides for relief for “a clerical error or a mutual mistake of act relative to the correct assessment figures, the

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<sup>105</sup> 456 Mich. at 417, 572 N.W.2d at 632.

<sup>106</sup> *Tyler v. Livonia Pub. Sch.*, 459 Mich 382, 392; 590 N.W.2d 560, 566 (1999) (citation omitted). See *supra* footnotes 82-84 and accompanying text for a discussion concluding that Section 53a is not ambiguous. Therefore, the doctrine of *in pari materia* should not be applied. However, because the Michigan Court’s have applied this doctrine to Sections 53a and 53b, the discussion is merited.

<sup>107</sup> *Schuster* at 418, 572 at N.W.2d 632.

<sup>108</sup> See *Mich. Humane Society v. Natural Resources Com.*, 158 Mich. App. 393, 401, 401 N.W.2d 757, 761 (1987).

<sup>109</sup> MCL § 211.53b. “[Section 53b ] was enacted to eliminate the last element of rigidity in Section 53—the necessity of court action to obtain a refund of an improperly paid tax.” *CICO, Inc. v. Mt. Morris Township*, No. 37354, 1981 Mich. Tax LEXIS 2, at \*8 (Mich. Tax. Tribunal Mar. 13, 1981). Section 53b was enacted to soften the harsh results of Section 53 that were not resolved when Section 53a was enacted. Section 53a can only be invoked by the taxpayer. Thus, the enactment of Section 53b provides a statutory remedy for the taxing authority.

rate of taxation, or the mathematical computation relating to the assessing of taxes[;] the error or mutual mistake shall be verified by the local assessing officer and approved by the board of review . . . . ”<sup>110</sup>

There are strikingly noticeable dissimilarities between Section 53a and 53b that establish that while both sections provide a statutory remedy for those circumstances in which a clerical error or mutual mistake of fact exists, the statutes do not relate to the same person or thing, or to the same class of persons, nor do they share a common purpose.

First, despite the notion that Sections 53a and 53b were implemented to soften the harsh results of Section 53, Section 53b narrows the circumstances in which the local taxing authority is afforded an opportunity to correct a clerical error or mutual mistake of fact.<sup>111</sup> The Michigan Legislature, in enacting Section 53b, specifically articulated those factual settings in which relief would be given, where the clerical error or mutual mistake of fact relates to the correct assessment figures, the rate of taxation, or the mathematical computation relating to the assessing of taxes.” Thus it appears that when Section 53b was enacted, the Michigan Legislature’s intent was to empower the local taxing authority to remedy an error, but only in

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<sup>110</sup> *Id.* The statutory provisions provide that under Section 53b to obtain a remedy, the taxpayer must have the mutual mistake of fact or the clerical error verified by the local assessing officer and approved by the board of directors. *Id.*

<sup>111</sup> The remedial provision in Section 53 mandates that “[the taxpayer] pay any tax or special assessment, whether levied on personal or real property, under protest, to the treasurer, specifying at the time, in writing, signed by him, the ground of such protest, and such treasurer shall minute the fact of such protest on the tax roll and in the receipt given. The person paying under such protest may, within 30 days and not afterwards, sue the township for the amount paid, and recover, if the tax or special assessment is shown to be illegal for the reason shown in such protest.” MCL § 211.53 (1970).

the articulated set of circumstances.<sup>112</sup> To the contrary, Section 53a allows recovery when a clerical error or mutual mistake is present; the language of Section 53a makes no mention of any limiting factors. In creating Section 53a, the Michigan Legislature was cognizant that the procedural allowance to a taxpayer of an action for recovery would ensure that the taxpayer seek resolution through the usual judicial means.<sup>113</sup>

The second striking dissimilarity between Sections 53a and 53b are the procedural requirements articulated in Section 53b. First, Section 53b allows for relief initiated by either the taxing authority or the taxpayer, while Section 53a is initiated only by the taxpayer. Second, Section 53b provides for a claim to be initiated within two years, while Section 53a allows a taxpayer to obtain relief by filing an action within three years of paying the tax. Thus, in Section 53b, the Michigan Legislature intended a more limited temporal scope.

Third, a Section 53b remedial claim requires the taxpayer to bring such claims before a special session of the local board of review, while Section 53a simply requires the filing of an action with the courts.

These striking dissimilarities speak to the intent of the Michigan Legislature. The clear outcome of a review of the two provisions is that the Michigan Legislature clearly expressed a different intent in enacting Section 53b than in enacting Section 53a. This is supported by the limiting procedures of Section 53b. Thus, Section 53b provides a simple, limited administrative remedy designed to correct the simplest of errors through actions of the

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<sup>112</sup> MCL § 211.53b.

<sup>113</sup> MCL § 211.53a.

local board of review.<sup>114</sup> However, the Michigan Courts and the Michigan Tax Tribunal have used the doctrine of *pari materia* to invoke a requirement of mutuality when the taxpayer claims either a mutual mistake of fact or clerical error under either Sections 53a or 53b despite the lack of finding a common person, class of persons, or common purpose.

## 2. *In pari materia* and Michigan Case Law

The doctrine of *in pari materia* has long been recognized by the Michigan Courts.<sup>115</sup> In the context of Section 53a, the Michigan Tax Tribunal first recognized the doctrine of *in pari materia* in the published decision of *Smith v. South Branch Township*.<sup>116</sup> The taxpayer asserted that the taxing authority's assessment, based on comparisons where the developer had guaranteed electricity, was the result of either a mutual mistake of fact or a clerical error. The taxpayer's property at one time was guaranteed to be provided with electrical service, but subsequent to purchasing the property the supply of electrical service was deemed to not be economically feasible.<sup>117</sup> The Tax Tribunal noted that this type of claim was not within the intent of the Michigan Legislature when Section 53a was enacted. The Tax Tribunal opined

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<sup>114</sup> It would seem clear that the Michigan Legislature deliberately carved out very specific restrictions when the local taxing authority was to resolve issues of clerical error or mutual mistake of fact under Section 53b. The restrictions imposed by Section 53b speak to the Legislature's narrow intent. Yet, the Michigan Tax Tribunal and the Court of Appeals have refused to exclude these restrictions from a Section 53a claim. The Michigan Courts have held that the court must presume a phraseological distinction reflects a legislative intent to treat concepts differently. *See Stowers v. Wolodzko*, 386 Mich 119, 191 N.W.2d 355 (1971); *see also Lickfeldt v. Dep't of Corrs*, 247 Mich App. 299, 636 N.W.2d 272 (2001).

<sup>115</sup> *See Buhl v. Township Board of Springwells*, 14 Mich. 398 (1866).

<sup>116</sup> *See Smith v. South Branch Township*, No. 61688, 1984 Mich. Tax LEXIS 13, at \*1, (Michigan Tax Tribunal June 6, 1984); *Gen. Prod. Del. Corp.*, 2001 Mich. Tax Lexis 4, at \*63-\*64.

<sup>117</sup> *See Smith*, 1984 Mich. Tax LEXIS 13, at \*4-\*5.

that Section 53a “alludes to questions of whether or not the taxpayer had listed all of its property, or listed property that it had already sold or not yet received, etc.”<sup>118</sup> Section 53b was to provide an alternative to Section 53 when there is a clerical error or mutual mistake of fact relative to the correct assessment figures, rate of taxation, or mathematical computation relating to the assessing of taxes.<sup>119</sup>

The Michigan Tax Tribunal noted that statutes *in pari materia* are to be construed together. It is both section 53a and 53b that provide remedial relief to the taxpayer in situations of clerical error or mutual mistake of fact. It is section 53b that lists the “simple errors.” Therefore, according to the Tax Tribunal, the taxpayer was foreclosed from asserting a clerical error or mutual mistake of fact under section 53a or 53b.<sup>120</sup>

The Michigan Tax Tribunal uses *International Place Apartments v. Ypsilanti Township*<sup>121</sup> as the “defining criteria” in applying the doctrine of *in pari materia* to Sections 53a and Section 53b.<sup>122</sup> Clerical errors or mutual mistakes of fact are only partially self-defining, and *International Place Apartments* opened the door to appreciation of the doctrine

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<sup>118</sup> *Id* at \*7. This statement by the Tax Tribunal is contrary to the holding in *General Products Delaware Corp.*, in this opinion, the Tax Tribunal stated, “The concept of mutual mistake in property tax law, in its application, is that mutuality must be present at both the level of referenced fact and the mistaken belief. The test criteria is simple. If each party references the same factual data, and draws the same mistaken belief, there is no ‘mutual mistake of fact.’ This concept of simple and readily identifiable mutuality will be further developed in shortly in an analysis of *International Place* under the rule of *in pari materia*.” *Id.* at \*9. Again, this presents an interesting question as to the reasoning of the changes in the MTT from this time period.

<sup>119</sup> *See id.* at \*7.

<sup>120</sup> *See id.* at \*7-\*8.

<sup>121</sup> 216 Mich. App. 104, 548 N.W.2d 668 (1996).

<sup>122</sup> *See Gen. Prod. Del. Corp.*, 2001 Mich. Tax LEXIS 4, at \*63. The Michigan Tax Tribunal proceeded to state that “*International Place* is the only available case law which provides an opportunity for *in pari materia* in this matter.”

of *in pari materia* by “using the characteristics of ‘clerical error’ to understand the defining criteria of ‘mutual mistake of fact.’”<sup>123</sup> The difficulty in accepting this argument is that a reading of *International Place Apartments* reveals that the taxpayers argument was that the “Tax Tribunal erred in concluding that the misfiling that causes the wrong assessment figure was not a clerical error correctable under [Section] 53b.”<sup>124</sup> Therefore, any reference using clerical error to define a mutual mistake of fact would be at most dicta, as the issue on appeal was whether a misfiling in the assessor’s office had occurred.<sup>125</sup> It is only by defining mutual mistake of fact through the characteristics of clerical error and using *International Place Apartments*, *Wolverine Steel*, and *Noll Equipment* that the Michigan Tax Tribunal is able to make a determination that mutual mistake of fact under Section 53b requires mutuality.<sup>126</sup>

In *Noll Equipment Co. v. Detroit*,<sup>127</sup> the taxpayer filed a statement claiming immunity from the payment of property taxes, but failed to pay the taxes under protest within the thirty-day requirement of Section 53.<sup>128</sup> The Michigan Court of Appeals reversed the trial court’s

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<sup>123</sup> See *General Products* at \*63-\*64.

<sup>124</sup> *Int’l Place Apartments v. Ypsilanti Township*, 216 Mich. App. 104, 107, 548 N.W.2d 669, 670 (1996).

<sup>125</sup> See *International Place Apartments*, 216 Mich. App. at 107-08, 548 N.W.2d at 669-70.

<sup>126</sup> See *General Products* 2001 Mich. Tax LEXIS 4, at \*64-\*65.

<sup>127</sup> 49 Mich. App. 37, 211 N.W.2d 257 (1973).

<sup>128</sup> See *Noll Equip. Co. v. Detroit*, 49 Mich. App. 37, 39-40, 211 N.W.2d 257, 258-59 (1973). The taxpayer was a foreign corporation who entered into a joint-venture with a Michigan Corporation for the purpose of using the taxpayer’s financial integrity with the Michigan Corporation’s automotive industry contacts. The foreign corporation imported and stored steel in Detroit warehouses. The taxpayer’s winning argument at the trial court was that imported steel was protected from taxation by the United State Constitution Article I Section 10(2). On appeal, the taxpayer argues that the failure to pay the property taxes under protest was a mutual mistake of fact.

finding that the foreign taxpayer was immune from payment of property taxes under the United States Constitution and held that the issue of whether the United States Constitution can be used to grant immunity to the taxpayer was a matter of law and not a question of question.<sup>129</sup> This holding should foreclose any discussion of *in pari materia* in the context of Sections 53a and 53b, because such a finding would require that the issue before the court address a question of fact, and any discussion by the court would, at the most, be merely dicta.

#### CONCLUSION

The purpose of Section 53a was to provide taxpayers with relief for the excess payment of taxes when a mutual mistake of fact existed. The cases surrounding the enactment Section 53a did not involve “mutuality” between the taxpayer and the local taxing authority. Yet, the Michigan Courts through case law have deemed this a requisite to obtaining relief as well as adding jurisdictional elements that deny the taxpayer proper due process. A simple remedial statute that was enacted to provide taxpayers with relief has been twisted into a

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<sup>129</sup> See 49 Mich. App. at 42-43, 211 N.W.2d at 259-60. In *General Products*, the Michigan Tax Tribunal uses the *Wolverine Steel Company* to hold that *in pari materia* applies to Sections 53a and Sections 53b. Further, the Michigan Tax Tribunal held that a mutual mistake of fact or clerical error under Section 53a requires a finding of mutuality. Yet, in *Wolverine Steel Company*, the court states that Section 53a “alludes to questions of whether or not the taxpayer had listed all of its property, or listed property that it had already sold or not yet received, etc.” *Wolverine Steel Co. v. Detroit*, 45 Mich. App. 671, 674, 207 N.W.2d 194, 196 (1973). It is difficult to understand how the requirement of mutuality can be imported into the factual context of a taxpayer who lists property that had not sold yet, the Michigan Tax Tribunal concludes that the following mutual mistakes of fact were excluded from mutual mistake of fact under Section 53a, property misidentified as to year of acquisition, assets disposed of were reported as still being owned, exempt special tools, property reported in the wrong classification, computer software classified, exempt industrial facilities were misclassified, and real property was misclassified and taxed as person property. See *Gen. Prod. Del. Corp.*, 2001 Mich. Tax LEXIS 4, at \*3-\*4.

statute that provides no relief to a taxpayer. Either the Michigan Supreme Court or the Legislature need to address these issues and give back to the taxpayer what was once available to them.