STATE OF MICHIGAN
DEPARTMENT OF ENERGY, LABOR & ECONOMIC GROWTH
MICHIGAN TAX TRIBUNAL

JDB Development, LLC,
Petitioner,

v MTT Docket No. 354524

Township of Vienna,
Respondent.

Tribunal Judge Presiding
Patricia L. Halm

ORDER DENYING PARTIES' STIPULATION FOR ENTRY OF CONSENT JUDGMENT

ORDER DISMISSING CASE

On July 25, 2008, JDB Development, LLC (Petitioner) filed the appeal in this matter contesting the assessed and taxable values of 72 parcels of property classified as residential (the subject property) for the 2005 through 2008 tax years. These values were established by the Township of Vienna (Respondent).

In its Petition, Petitioner states, *inter alia*:

1. "For the 2004 assessment year(s), the assessed values and taxable value(s) have been set forth on attached exhibit . . . ."
2. "The taxable value set forth by the Respondent for the years at issue include public service improvements added to taxable value under MCL 211.34d(1)(b)(viii)."
3. "The parties mutually believed at the time the assessment was set forth by the Respondent, that the Respondent was entitled to add public service improvements under MCL 211.34d(1)(b)(viii) to the taxable value of the property."
4. "Subsequent to the date of assessment for the earlier years, the Michigan Supreme Court held that MCL 211.34d(1)(b)(viii) is unconstitutional. *Toll-Northville v Northville Twp*, 480 Mich 6; 743 NW2d 902 (2008)."
5. "Petitioner has paid the taxes for said years within three (3) years of the date of this Petition."
6. "Under MCL 211.53a, the Petitioner may bring an action in the Michigan Tax Tribunal for recovery of taxes paid in excess of the correct and lawful amount due because of a mutual mistake of fact."
7. "The Michigan Supreme Court held in *Ford Motor Co v City of Woodhaven*, 475 Mich 425; 716 NW2d 247 (2006) that a mutual mistake of fact under MCL 211.53a means a mutually mistaken belief about a material fact of condition."
8. "The Michigan Court of Appeals has also held that a mutual mistake of fact may encompass a mistaken belief under the law. *Eltel Associates LLC v City of Pontiac*, [278 Mich App 588; 752 NW2d 492 (2008)]."

On February 13, 2009, the parties filed a Stipulation for Entry of Consent Judgment, wherein the parties agreed to assessed and taxable values for the subject property for the 2007 and 2008 tax years, and agreed to dismiss the appeal of the 2005 and 2006 tax years. On February 27, 2009, the parties filed a stipulation as to the value of the public improvements for the 2007 and 2008 tax years and requested that these values be deducted from the subject property's taxable values.

The Tribunal, having dealt with this same issue in *Toll Northville, LLC and Biltmore-Wineman, LLC v Township of Northville*, (Docket No. 284952), finds that the Stipulation for Entry of Consent Judgment must be denied and that this case must be dismissed for the same reasons that Respondent was granted summary disposition in MTT Docket No. 284952.

While different tax years are under appeal, the issue in this case is the same as in MTT Docket No. 284952, specifically whether public service improvements made to the subject property, presumably in 2004, and added to the property's 2005 taxable value, may be subtracted from the property's 2008 taxable values due to the fact that MCL 211.34d(1)(b)(viii) was held unconstitutional in 2008. For the reasons set forth below, the Tribunal finds that they may not.

The requirements that must be met in order for the Tribunal to acquire jurisdiction in an appeal are set forth in Section 35 of the Tax Tribunal Act. In relevant part, Section 35 provides:

> The jurisdiction of the tribunal in an assessment dispute is invoked by a party in interest, as petitioner, filing a written petition on or before June 30 of the tax year involved . . . All petitions required to be filed or served by a day during which the offices of the tribunal are not open for business shall be filed by the next business day. (MCL 205.735(3))

In this case, the Petition was filed on July 25, 2008. Thus, pursuant to MCL 205.735, in this case the first tax year in which the Tribunal has jurisdiction is the 2008 tax year.

The requirements for assessing property and the formula for calculating taxable value are found in Article IX, §3, of the Constitution of the State of Michigan. In relevant part, §3 provides:

> The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not, after January 1, 1966, exceed 50 percent; and for a system of equalization of assessments. **For taxes levied in 1995 and each year thereafter, the legislature shall provide that the taxable value of each parcel of property adjusted for additions and losses, shall not increase each year by more than the increase in the immediately preceding year in the general price level, as defined in section 33 of this article, or 5 percent, whichever is less until ownership of the parcel of property is transferred.** When ownership of the parcel of property is transferred as defined by law, the parcel shall be assessed at the applicable proportion of current true cash value. (Emphasis added.)

The general property tax act ("GPTA"), being MCL 211.1 *et seq*, implements the legislative determination required by Article IX, §3. Specifically, MCL 211.27a provides, in relevant part:

> 1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963.
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> (2) Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:
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> (a) The property's taxable value in the immediately preceding year **minus any losses**, multiplied by the lesser of 1.05 or the inflation rate, **plus all additions**. For taxes levied in 1995, the property's taxable value in the immediately preceding year is the property's state equalized valuation in 1994.
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> (b) The property's current state equalized valuation.
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> (3) Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer. (Emphasis added.)

Therefore, the starting point of a property's taxable value in any given year is the property's taxable value in the previous year.

In this case, to arrive at the subject property's 2008 taxable value, the subject property's 2007 taxable value was multiplied by the rate of inflation, 1.023%. Petitioner does not assert that there were additions or losses to the subject property in 2007. Moreover, Petitioner has not asserted that the subject property's 2008 taxable value was incorrectly calculated. Therefore, this is the end of the taxable value calculation required under MCL 211.27a for the subject property for the 2008 tax year.

While it is clear that under the Michigan Supreme Court's decision in *Toll Northville* additions made to taxable value for installation of public service improvements under MCL 211.34d(1)(b)(viii) are unconstitutional, no such additions were made in the first tax year under appeal in this case, that being the 2008 tax year. The Tribunal simply has no statutory or constitutional authority under these circumstances to examine previous tax years and require that changes be made to the taxable values in those years.

There are numerous Michigan court decisions in which the Tribunal's decision not to address a property's prior taxable value for lack of jurisdiction has been upheld. For example, in *Leahy v Orion Twp*, 269 Mich App 527; 711 NW2d 438 (2006), the Michigan Court of Appeals dealt with a case remarkably similar to the case at hand. In an earlier case filed by the same petitioner, the petitioner challenged the 2002 assessment of his property by suing the respondent in circuit court instead of by filing a petition at the Tribunal. See *Leahy v Orion Twp*, unpublished opinion

per curiam of the Court of Appeals, issued December 14, 2004 (Docket No. 250406). The circuit court dismissed the case for lack of jurisdiction. The Court of Appeals affirmed the circuit court's decision. In the following year, the petitioner filed a petition at the Tribunal challenging his property's 2003 taxable value. The Tribunal agreed with the petitioner that its 2003 taxable value was incorrectly calculated, but declined to address previous years' taxable values as the petitioner requested.

> . . . the tribunal found that it lacked jurisdiction to revisit the 2000 through 2002 assessments because petitioner had
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> > failed to appeal his assessment in said years [2000 through 2002]; therefore, those years are not currently before the Tribunal. As a general rule, the Tribunal lacks jurisdiction to revise a property's taxable value with respect to tax years not properly before it. An exception to this rule is set forth in MCL 211.53a...In the instant case, however, the mistake, if any, in Respondent's determination of the subject property's taxable value for 2000-2002 was not the result of a clerical error or mutual mistake of fact; thus the Tribunal does not have jurisdiction over those tax years, and no revisions may be made to the taxable values set forth by Respondent. *Leahy*, p529.

In his appeal to the Court of Appeals,

> . . . petitioner argued that the tax code requires property taxes to be based on the prior year's assessed value, so the prior year's value *must* be the correct value. Petitioner suggests on appeal that because the tribunal found that respondent had erred in the 2003 assessment, respondent must recognize its errors for the years 2000 through 2002, correct those assessments, and then recompute the 2003 taxable value. *Leahy*, p529.

The court rejected the petitioner's argument, holding that:

> Petitioner cannot be aggrieved by the tribunal's finding that respondent erroneously computed the 2003 assessment. Rather, petitioner challenges the 2003 assessment to the extent that it remains premised on an incorrect starting point. Thus, petitioner argues that the 2003 assessment remains erroneous because it was computed on the basis of the 2002 taxable value of $137,910. However, this challenge presents a collateral attack on a matter that is no longer subject to litigation.
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> Collateral estoppel bars relitigation of an issue in a new action arising between the same parties or their privies when the earlier proceeding resulted in a valid final judgment and the issue in question was actually and necessarily determined in that prior proceeding. The doctrine bars relitigation of issues when the parties had a full and fair opportunity to litigate those issues in an earlier action. A decision is

> final when all appeals have been exhausted or when the time available for an appeal has passed.
>
> Petitioner's attempts to challenge the 2002 assessment culminated in this Court's affirmance of the circuit court's dismissal of petitioner's complaint. The record shows that, in that appeal, petitioner failed to take advantage of appellate opportunities to disturb the challenged assessment while he had time to do so. This Court affirmed both the circuit court's dismissal for lack of jurisdiction and its award of sanctions, rejecting petitioner's attempt to characterize his claim as a constitutional one. *Leahy, supra*, slip op at 1-2. Because the time available for appeals has run out, that assessment now stands as final. Therefore, petitioner is precluded from attacking the 2002 taxable value assessment. We agree with the Tax Tribunal that the starting point for the 2003 assessment was the final figure resulting from the initial 2002 assessment and petitioner's failed attempts to appeal it: $137,910. (Citations omitted.) *Leahy*, p530.

In this case, Petitioner makes the same argument as the petitioner in *Leahy*. Petitioner requests that the Tribunal take into consideration the fact that the subject property's 2008 taxable value was increased due to an addition made to the property in 2004. The Tribunal finds while the tax years are different, the facts in this case are indistinguishable from those in *Leahy.* In each case the "petitioner failed to take advantage of appellate opportunities to disturb the challenged assessment while he had time to do so." *Leahy*, p530. In this case, Petitioner failed to take advantage of appellate opportunities because they did not file an appeal in the Tribunal in the year after the public service improvements were added to the subject property's taxable value.

Moreover, as in *Leahy*, because the time available for appealing the subject property's 2005 taxable value has run out, that assessment now stands as final. Given this, the Tribunal finds that *Leahy* is binding authority and that the question of whether or not the Tribunal can revisit an earlier year for the purpose of calculating a year properly before it is **not** an open question. Petitioners are precluded from attacking the 2008 taxable value.

Another case dealing with an attempt to deal with "the legality of the precipitate increase" in a property's taxable value was *Springhill Associates, et al v Township of Shelby*, unpublished opinion per curiam of the Court of Appeals, decided December 11, 2003, (Docket Nos. 247100, 247101, 247102, 247103, 247104, 247105). In that case, the petitioners argued that:

> [T]he Tax Tribunal erred in granting respondent's motions for summary disposition with regard to the 2002 taxable values of petitioners' property. The Tax Tribunal found that it lacked subject matter jurisdiction to consider the legality of the precipitate increase in the taxable values of petitioners' property from the year 2000 to 2001, because petitioners failed to timely file petitions protesting the 2001 taxable values of their property. The tribunal further found that because it could not alter the excessive 2001 taxable values, and because the 2002 taxable values were correctly calculated by the simple application of a statutory inflation factor to the 2001 taxable values, respondent was entitled to summary disposition. Petitioners contend that while they cannot request a refund

> for the 2001 taxes assessed on their property because of their failure to timely file a petition protesting the 2001 tax assessments, they are entitled to protest the 2002 assessments and to call for an examination of the taxable values of their property, even if this means examining the excessive increase in their 2001 taxable values. *Id*.

Before rendering its decision, the court reiterated applicable language from previous decisions.

> The Tax Tribunal has exclusive and original jurisdiction to review final decisions relating to assessments or valuations under the property tax laws. MCL 205.731(a). To invoke the tribunal's jurisdiction, a party in interest must file a written petition "on or before June 30 of the tax year involved." MCL 205.735(2). This statute "is not a notice statute, but a jurisdictional statute that governs when and how a petitioner invokes the Tax Tribunal's jurisdiction." *EDS v Flint Twp,* 253 Mich App 538, 542-543; 656 NW2d 215 (2002). Failure to correct assessments and evaluations in the manner and time provided by statute precludes later attack upon the assessment. *Auditor General v Smith,* 351 Mich 162, 168; 88 NW2d 429 (1958). The Tax Tribunal properly grants summary disposition to a respondent on the basis of the lack of subject matter jurisdiction when the petitioner fails to timely file the petition. *Kelser v Dep't of Treasury,* 167 Mich App 18, 20-21; 421 NW2d 558 (1988).

The court held that:

> The tribunal correctly determined that petitioners' failure to challenge the 2001 taxable values within the statutory period prevented the tribunal from hearing and deciding it. So the only question before the tribunal was whether the assessor properly applied the statutory inflationary factor to the 2001 taxable values of the petitioners' property when it determined the 2002 taxable values. Because there was no genuine issue of material fact that the assessor correctly made this simple calculation, the tribunal properly granted respondent's summary disposition motion . . . Petitioners argue that because they are challenging the 2002 taxable values and have properly invoked the tribunal's subject matter jurisdiction on this issue, they are entitled to have the tribunal reexamine the excessive increase in 2001 taxable values of their property. This is sophistry. A timely filed petition with regard to the 2002 taxable values restricts petitioners' proofs and the tax tribunal's inquiry to whether the 2002 taxable values were correctly calculated based on the 2001 taxable value. *Auditor General, supra.* It does not enable petitioners to circumvent the jurisdictional requirements of the Tax Tribunal. *Id.*

While *Springhill* is an unpublished decision and therefore not binding, the Tribunal concurs with the court's analysis and finds the decision persuasive.

In making its decision in *Toll Northville,* the Court of Appeals refused to consider *Springhill* because the issue presented in *Toll Northville* was the constitutionality of MCL 211.34d(1)(b)(viii) and not the Tribunal's jurisdiction. The court specifically stated that "[w]hile

we acknowledge that *Springhill* and *Leahy* limit the Tax Tribunal's authority to decide the accuracy and methodology of assessments to the tax years timely appealed, we do not agree that those decisions limit our ability to resolve the constitutional issue at hand." *Toll Northville v Township of Northville*, 272 Mich App 352, 360; 726 NW2d 57 (2007). The court went on to state that:

> Failure to correct assessments and evaluations in the manner and time provided by statute precludes later attack on the assessment. The Tax Tribunal properly grants summary disposition to a respondent on the basis of the lack of subject-matter jurisdiction when the petitioner fails to timely file the petition. *Id*., p360.

In *Singh v City of Northville,* unpublished opinion per curiam of the Court of Appeals, decided January 12, 2006, (Docket No. 256258), the court again dealt with a case in which the petitioner appealed a property's taxable value, but the appeal "was premised on an alleged erroneous increase in taxable value for [a previous] tax year." *Id*. Of particular importance is the fact that the alleged erroneous increase in the 2000 taxable value was due to an addition that was held unconstitutional two years later, in 2002.

In *Singh,* the addition to taxable value in question was that of an increase attributable to the property's occupancy rate under MCL 211.34d(1)(b)(vii). The addition was held unconstitutional in *WPW Acquisition Company v City of Troy*, 466 Mich 117; 643 NW2d 564 (2002). In *Singh,* the court stated:

> There is no dispute that respondent relied on the unconstitutional provision as a basis for uncapping the taxable value for the 2000 tax year with respect to the subject property. But the issue here is whether petitioner may obtain relief with respect to the property's value for the 2003 tax year on the basis of an increase in the taxable value in 2000 that was premised on a statutory provision that was later deemed unconstitutional. *Id*.

The court held that:

> . . . regardless of whether petitioner previously timely filed a petition challenging the taxable value for the 2000 tax year, the tribunal correctly granted summary disposition in favor of respondent in this case, which involves a challenge to the taxable value for the 2003 tax year. Even if petitioner properly invoked the tribunal's jurisdiction with respect to the 2000 tax year in *Singh Dev Corp v. City of Northville,* Tax Tribunal Docket No. 277482, the tribunal dismissed that action on procedural grounds. As a result, petitioner failed to obtain relief with respect to the 2000 taxable value. "Failure to correct assessments and evaluations in the manner and time provided by statute precludes later attack upon the assessment." *Auditor Gen v Smith,* 351 Mich 162, 168; 88 NW2d 429 (1958). **The fact that petitioner's prior failure was the result of its failure to comply with the tribunal's orders as opposed to its failure to file a timely petition is a distinction without a difference.**
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> ***

> Petitioner maintains that an unconstitutional statute is void ab initio and, therefore, the ruling in *WPW Acquisitions, supra,* "must be applied to negate Respondent Appellant's action in uncapping the 2000 & subsequent years' Taxable Values." Although petitioner cites authority for the proposition that unconstitutional statutes are void ab initio, petitioner does not cite any authority for the proposition that a determination of unconstitutionality of a statute nullifies the limitations on the tribunal's authority to examine the taxable values of property for prior years. Petitioner has failed to adequately address this point. (Emphasis added.) *Id*.

While *Singh* is an unpublished decision, and therefore not binding on the Tribunal, the Tribunal finds the analysis presented in *Singh* persuasive. Given this, and for the reasons discussed herein, the Tribunal finds that Petitioner, like the petitioner in *Singh*, failed to properly pursue relief in its direct challenge to the 2008 taxable value, and is now precluded from collaterally attacking that taxable value in the context of this challenge to the 2005 taxable value. *Singh, supra*.

Having made this determination, two issues remain. First, whether the Court's holding in *Toll Northville Ltd and Biltmore-Wineman, LLC v Township of Northville*, 480 Mich 6; 743 NW2d 902 (2008), should be applied retroactively; and second, whether the addition to the subject property's 2005 taxable value should be considered a mutual mistake of fact or clerical error pursuant to MCL 211.53a.

The question of whether its decision should be applied retroactively was not addressed by the Court in *Toll Northville*. "Sometimes a court which announces a change of law will refrain from going the next step to indicate how its new rule is to be applied. In such a situation, the prospective-retrospective issue is left for decision in a later case." *Riley, et al v Detroit Board of Education*, 431 Mich 632, 643; 433 NW2d 787 (1988). In both *Toll Northville* and *WPW*, the Court refrained from going the next step. As such, it appears as though this is the "later case" in which this issue must be decided.

"Courts have acknowledged that resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley*, p644. In *Pohutski, et al v City of Allen Park, et al*, 465 Mich 675; 641 NW2d 219 (2002), the Court stated that "[a]lthough the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity." (Citations omitted.) *Id*. pp695-696.

> This court has overruled prior precedent many times in the past. In each such instance the Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change...While fairness is a goal, certain rules or principles have evolved which provide guidance in resolving the retroactive-prospective dilemma. *Riley*, p645, quoting *Placek v Sterling Heights*, 405 Mich 638; 275 NW2d 511 (1979).

The resulting test to be applied in situations such as this was adopted from *Linkletter v Walker*, 381 US 618; 85 S CT 1731; 14 L Ed 2d 601 (1965), and set forth in *People v Hampton*, 384 Mich 669, 674; 187 NE2d 404 (1971). This test requires a court to weigh: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice," or, in a civil case, whether "the decision clearly [establishes] a new principle of law." *Riley*, pp645-646.

In *Bolt v City of Lansing***,** 238 Mich App 37; 604 NW2d 745 (1999), the Court of Appeals dealt with the question of whether the Supreme Court's decision in *Bolt v City of Lansing*, 459 Mich 152; 587 NW2d 264 (1999), should be given retrospective or prospective application.

> [A]s our Supreme Court recognized in *Lindsey v Harper Hospital*, 455 Mich 56, 58; 564 NW2d 861 (1997), particular circumstances may warrant only prospective application:
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> > [W]here injustice might result from full retroactivity, this Court has adopted a more flexible approach, giving holdings limited retroactive or prospective effect. This flexibility is intended to accomplish the "maximum of justice" under varied circumstances.
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> A key consideration under *Lindsey* in deciding if a decision should be given prospective or retrospective application is: Did the judicial decision announce a new and unexpected rule of law, or did it merely clarify, extend, or interpret existing law? A decision should be applied prospectively if the decision overrules settled precedent or decides an issue of first impression "whose resolution was not clearly foreshadowed" . . . Of course, a decision regarding an issue of first impression does not necessarily require prospective application. If the decision merely provides a clarified legal interpretation without announcing a new rule of law or a change in existing law, the decision should be retroactively applied. (Citations omitted.) *Id*., p750.

Having considered these things and the three-part test set forth in *People v Hampton*, the *Bolt* court concluded that the "decision announced a new and unanticipated rule of law concerning a significant public issue of first impression" and should be applied prospectively. *Id*., p45.

Applying the three-part test to the instant case, the Tribunal finds that the purpose to be served by the "new rule" set forth in *Toll Northville* was to declare MCL 211.34d(1)(b)(viii) unconstitutional. As to the second part of the test, the Tribunal finds that reliance on MCL 211.34d(1)(b)(viii) was extensive as it was relied upon for fourteen years, beginning in 1994 with the adoption of Proposal A. This reliance was not misplaced as "[s]tatutes are presumed constitutional unless the unconstitutionality is clearly apparent." *Toll Northville*, citing *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999), p11. "If tax legislation is at issue, then the presumption is especially strong. Until a taxing statute has been shown to 'clearly and palpably violate[] the fundamental law,' it will not be declared unconstitutional." (Citations omitted.) *Dana Corporation v Department of Treasury*, 267 Mich App 690, 694; 706 NW2d 204 (2005). In *Toll Northville*, the unconstitutionality of MCL 211.34d(1)(b)(viii) was not clearly

apparent. At best, the constitutionality of MCL 211.34d(1)(b)(viii) could not have been called into question until after the Michigan Supreme Court's decision in *WPW* in 2002, which was after the addition for public improvements was made to the subject properties' taxable value.

Finally, the third part of the test requires a court to determine whether the decision clearly establishes a new principle of law. The Tribunal finds that, as in *Bolt*, the Court's decision in *Toll Northville* announced a new and unanticipated rule of law concerning a significant public issue of first impression. Thus, under this test the decision in *Toll Northville* should be applied prospectively.

The *Bolt* Court also discussed the Michigan Supreme Court's decision in *Michigan Educational Employees Mutual Insurance Company v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999), wherein the Court set forth two other things to take into consideration when deciding the question of retrospective or prospective application. Specifically, the Court stated:

> [I]t has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.". . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity. (Citations omitted.) *Bolt*, p48.

Having weighed the merits and demerits, the Tribunal finds that a decision requiring retroactive application of the *Toll Northville* decision would produce substantial inequitable results. Since 1994, every assessing unit in Michigan in which "public improvements" have been installed, having no authority to otherwise ignore a statute, has increased the property's taxable value pursuant to MCL 211.34d(1)(b)(viii). Retroactive application of the *Toll Northville* decision would require each of these hundreds of units of government to review fourteen years of assessment rolls to determine which properties' taxable values were increased pursuant to MCL 211.34d(1)(b)(viii). Having done so, every unit of government that levied a millage against that taxable value would have to issue a refund of excess taxes paid. The result would be an extreme hardship that can only be avoided by prospective application.

Having found that the decision in *Toll Northville* should be given prospective application, the only other issue to be addressed is whether a clerical error or mutual mistake of fact occurred that would permit Petitioner to include the 2002 tax year in this case.

> Pursuant to MCL 211.53a:
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> Any taxpayer who is assessed and pays taxes in excess of the correct and lawful amount due because of a clerical error or mutual mistake of fact made by the assessing officer and the taxpayer may recover the excess so paid, without interest, **if suit is commenced within 3 years from the date of payment**, notwithstanding that the payment was not made under protest. (Emphasis added.)

In this case, the Tribunal finds that the addition to the subject properties' 2005 taxable value pursuant to MCL 211.34d(1)(b)(viii) was not a clerical error. Clearly, this addition was made intentionally and was based upon the state equalized value of the improvements as required pursuant to MCL 211.27a. Moreover, for the reasons set forth below, the Tribunal finds that the additions made pursuant to MCL 211.34d(1)(b)(viii) were not the result of a mutual mistake of fact.

In *Ford Motor Company v City of Woodhaven, et al*, 475 Mich 425; 716 NW2d 247 (2006), the Michigan Supreme Court interpreted the phrase "mutual mistake of fact" in MCL 211.53a to mean "an erroneous belief, which is shared and relied upon by both parties, about a material fact that affects the substance of the transaction." *Id*., p443. In this case, Respondent calculated the subject property's 2005 taxable value pursuant to MCL 211.34d(1)(b)(viii). At that time, MCL 211.34d(1)(b)(viii) was valid; therefore, there was no mistake as to a material "fact."

This position is supported by the Court of Appeals' decision in *Wolverine Steel Company v City of Detroit*, 45 Mich App 671; 207 NW2d 194 (1973). In that case the City of Detroit levied a tax in violation of the United States Constitution. *Id*., p675. The Wolverine Steel Company asserted that there had been a mutual mistake of fact between the assessing officer and the taxpayer and requested a refund of the tax it paid under MCL 211.53a. The court held:

> On the facts as presented, contrary to the trial court's ruling, we believe that a "mutual mistake" was made. However appellant is still not entitled to recovery under MCLA §211.53a; MSA §7.97(1). An error made in determining the application of the United States Constitution to the tax laws of Michigan is not the type of mistake of fact required by this statute…When the words 'mutual mistake of fact made by the assessing officer and the taxpayer' are construed in the light of the other type of mistakes covered by this section, i.e., a 'clerical error', it seems clear that the statute was not intended to apply to mistakes in determining the application of the United States Constitution to the tax laws of Michigan. This would not generally be assumed to be within the province of a taxpayer and the tax assessor . . . .
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> Case law in Michigan also indicates that the appellant may not recover, because if any mistake did occur it was not a mistake of "fact." *Upper Peninsula Generating Company v City of Marquette*, 18 Mich App 516, 517; 171 NW2d 572 (1969), the plaintiff had paid ad valorem taxes for the years 1965 and 1966. Sometime in 1967 the plaintiff became convinced that the taxes had been illegally assessed because the millage had been in excess of the 15-mill limitation imposed by article 9, section 6 of the Michigan Constitution of 1963, and had not received the approval of the electorate. The plaintiff sought recovery under MCLA 211.53a as does the appellant here. This Court denied recovery holding that an error of the type made could not be characterized as a 'mistake of fact'.
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> The error made in the *Upper Peninsula* case was the same type of error that was made in the present case. In the *Upper Peninsula* case the City of Marquette levied taxes in violation of the Michigan Constitution. In the present case the

> appellees levied taxes in violation of the United States Constitution. In both cases the plaintiff and the defendants thought that the taxes were valid at the time they were paid. In the *Upper Peninsula* case this was held not to be an error of fact within the meaning of the statute. The same result must, therefore, be reached in the present case . . . . *Id*., pp673-677.

In this case, Respondent levied taxes based on a statute that was ultimately determined to be in violation of Article 9, §3 the Constitution of the State of Michigan. As in *Wolverine Steel*, the parties in this case thought the taxes were valid at the time they were paid. Thus, the result reached in *Wolverine Steel* must be reached in the present case.

In *Briggs Tax Service, LLC v Detroit Public Schools, et al*, 485 Mich 69; 780 NW2d 753 (2010), the Michigan Supreme Court addressed several issues, one of which was mutual mistake of "fact" under MCL 211.53a. In addition to *Upper Peninsula Generating Co, supra,* the Court discussed the holdings in *Carpenter v City of Ann Arbor*, 35 Mich App 608; 192 NW2d 523 (1971), and *Herzog v Detroit*, 378 Mich 1; 142 NW2d 672 (1966), and summarized these holdings by stating that "[t]hese cases stand for the proposition that a mistake about a validity of a tax constitutes a mistake of law." *Briggs*, p__. The Court went on to stated that "[w]e agree with their reasoning and reaffirm that collection of an unauthorized tax constitutes a mistake of law, not a mistake of fact." *Id*., p__.

The *Briggs* Court also discussed *Ford Motor Company, supra,* and the lower court's reliance on this decision. The Court stated that in *Ford Motor Company*:

> We held that Ford had stated valid claims of mutual mistake of fact under MCL 211.53a. Ford and the assessors shared and relied on an erroneous belief about a material fact that affected the substance of the transactions. Specifically, Ford's property statements overstated the amount of its taxable property, including reporting the same property twice. As this mistake concerned a numeric value, it was inherently a factual mistake.
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> In contrast, the mistake in this case was the imposition of an unlawful tax. Therefore, *Ford* does not support petitioner's contention that a mistake of fact occurred here. Indeed, in reaching our decision in Ford, we did not consider or discuss the distinction between a mutual mistake of fact and a mistake of law. *Id*., p__.

The *Briggs* Court also discussed *Eltel, supra,* another case relied upon by Petitioner. The Court stated that:

> The Court of Appeals also mistakenly relied upon *Eltel Assoc, LLC v City of Pontiac* for its conclusion that a mistake of fact occurred. *Eltel* involved a purely factual issue concerning the date on which title to property passed from a tax-exempt owner to a nonexempt owner . . . *Eltel* did not involve the validity of the

> underlying tax, which is a legal issue. Therefore, it is of no consequence to the disposition of this case. *Id.*, p__.

The *Briggs* Court concluded by stating:

> We hold that DPS's mistake of levying an unauthorized 18-mill property tax for tax years 2002, 2003, and 2004 does not constitute a "mutual mistake of fact made by the assessing officer and the taxpayer" within the meaning of MCL 211.53a. Accordingly, the Tax Tribunal correctly ruled that petitioner's claim is subject to the 30-day limitations period of former MCL 205.735(2) and that the three-year limitations period of MCL 211.53a does not apply. *Id.*, p__.

As in *Briggs*, the Tribunal finds that there was no mutual mistake of "fact" made by the assessing officer and the taxpayer.

The Tribunal further finds that, in this case, there was no mistake of law. In 2004, when the public service improvements were presumably made to the subject property, and in 2005 when 50% of the value of these improvements were added to the property's taxable value, MCL 211.34d(1)(b)(viii) was a valid statute. Respondent was required by law to add 50% of the value of the public service improvements to the property's taxable value. It wasn't until several years later that MCL 211.34d(1)(b)(viii) was held unconstitutional. Moreover, unlike *Briggs*, this case does not involve the collection of an unauthorized tax.

The Tribunal rejects Petitioner's attempt to categorize Respondent's adherence to the law and Petitioner's acquiescence in this adherence as a "mutual mistake" in order to reach back in time so that the Tribunal may acquire jurisdiction in this matter. Petitioner is simply trying to include an issue and a tax year that would otherwise be time-barred.

Because this case only involves the issue of the value of public service improvements included in the subject property's 2005, 2006, 2007 and 2008 assessed and taxable values, the Tribunal finds that the Petition was not timely filed pursuant to MCL 205.735 and MCL 205.735a. Given this, the Tribunal does not have jurisdiction in this matter and this case must be dismissed. See *Electronic Data Systems Corporation v Township of Flint*, 253 Mich App 538; 656 NW2d 215 (2002).

Therefore,

IT IS ORDERED that the Stipulation for Entry of Consent Judgment is DENIED.

IT IS FURTHER ORDERED that this case is DISMISSED.

MICHIGAN TAX TRIBUNAL

Entered: May 18, 2010

By: Patricia L. Halm