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**NOTICE TO TAXPAYERS REGARDING
*ASHLEY CAPITAL, LLC v DEPARTMENT OF TREASURY***

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I. Summary of *Ashley Capital, LLC v Department of Treasury*

On January 5, 2016, the Michigan Court of Appeals approved for publication its decision in *Ashley Capital, LLC v Department of Treasury*¹ originally issued November 10, 2015. At issue in *Ashley Capital* was the order in which the taxpayer is required to take its Compensation Credit and Investment Tax Credit (“ITC”) under MCL 208.1403 relative to any unused carryforward amounts from credits provided under the former Single Business Tax (“SBT”) when determining its Michigan Business Tax (“MBT”) liability.

The Department’s position, as reflected in its forms, was that a taxpayer is required to first apply any unused SBT credit carryforwards under MCL 208.1401 before taking its Compensation Credit and ITC under MCL 208.1403. *Ashley Capital* asserted that the MBT Act required it to apply its Compensation Credit and ITC before applying its unused credit carryforward amounts. The Court of Appeals found in favor of *Ashley Capital*. The court held that the language in subsection 403(1) of the MBT Act, which states, “[n]otwithstanding any other provision in this act, the credits provided in this section [i.e., the Compensation Credit and the ITC] shall be taken before any other credit under this act[.]”² placed the Compensation Credit and the ITC in a “super priority” position relative to all other credits a taxpayer might claim under the MBT Act, both those that originated under the MBT Act as well as those created under the former SBT Act. Further, the court interpreted the phrase “credit under this act” in subsection 403(1)³ to include SBT credit carryforwards. The court thus found that the credit carryforwards exist “under” the MBT Act and are covered by the ordering provision set forth in MCL 208.1403(1).

II. Impact of *Ashley Capital, LLC v Dep’t of Treasury* Decision

Because the *Ashley Capital* decision is published, it is binding on the Department. Accordingly, for purposes of determining the priority in which the Compensation Credit and the ITC are taken relative to other credits when calculating a taxpayer’s MBT liability, SBT credit carryforwards will be considered credits under the MBT Act. In accordance with *Ashley Capital* and consistent with a series of cases⁴ that require the Department to give judicial decisions full retroactive effect

¹ ___ Mich App ___ (2015).

² MCL 208.1403(1).

³ *Id.*

⁴ *Syntex Laboratories v Dep’t of Treasury*, 233 Mich App 286 (1998); *Rayovac Corp v Dep’t of Treasury*, 264 Mich App 441 (2004); *JW Hobbs v Dep’t of Treasury*, 268 Mich App 38 (2005); *Int’l Home Foods Inc v Dep’t of Treasury*, 477 Mich 983 (2007).

– even in the presence of contrary guidance issued by the Department prior to the date of the decision – *Ashley Capital* will be applied to all open tax years.

III. Administrative Requirements for Taxpayers Seeking a Refund under *Ashley Capital*

A taxpayer seeking a refund of taxes paid due to credit order within the *Ashley Capital* decision should file an amended return Form 4567 and a modified Form 4568 that reflects a reordering of the SBT credit carryforwards, Compensation Credit, and Investment Tax Credit (lines 2, 3 and 4) with the Department within the statute of limitations.⁵ The general statute of limitations period for claiming a refund is 4 years from the date set for the filing of the original return for the respective tax year.⁶ The amended return Form 4567 and modified Form 4568 should be sent to the address noted on Form 4567 and supporting instructions.

⁵ MCL 205.27a.

⁶ MCL 205.27a(2).