Michigan Department of
TREASURY UPDATE

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# Michigan Adopts Sales and Use Tax Economic Nexus Standards for Remote Sellers

The 1992 U.S. Supreme Court decision in *Quill Corp v North Dakota* limited the ability of states to require out-of-state sellers to collect or pay sales taxes on sales to purchasers within their state unless that seller had a “physical presence” in the state. As noted in the *February Update*, the result was that states and local governments were losing billions of dollars in uncollected sales and use taxes from out-of-state sellers.

In 2016, South Dakota enacted legislation that requires out-of-state retailers to collect and remit sales and use tax if they annually conduct with South Dakota residents either (1) $100,000 worth of business, or (2) 200 separate transactions. Shortly after South Dakota enacted this economic presence statute, litigation ensued. The case *South Dakota v. Wayfair, Inc* proceeded all the way to the U.S. Supreme Court.

On June 21, 2018, the U.S. Supreme Court issued its opinion in Wayfair holding that that an out-of-state seller may be required to collect or pay a state’s sales tax if the seller “avails itself of the substantial privilege of carrying on business in that jurisdiction.” Applying this new test, the Court held that South Dakota’s law was constitutional. The Court also cited approvingly to various aspects of South Dakota’s law. First, the Court found it important that South Dakota’s law had a safe harbor for smaller sellers. Second, the law explicitly stated that it applied only on a prospective basis. And finally, South Dakota is a member of the Streamlined Sales and Use Tax Agreement (as is Michigan), therefore, it has standardized its sales tax to reduce administrative and compliance costs under the Streamlined Sales and Use Tax Agreement.

*Wayfair* represents an expansion of activity that may require an out-of-state seller to collect or pay a state’s sales tax; note, however, that a seller’s physical presence in a state may still require it to collect or pay a state’s tax regardless of economic activity.

On August 1, 2018, the Department published RAB 2018-16 establishing a new policy for when an out-of-state seller is required to pay Michigan sales tax. The RAB provides that, effective October 1, 2018, an out-

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of-state seller that has sales into Michigan exceeding $100,000, or a seller that completes 200 or more separate transactions of sales into this state in the previous calendar year is required to remit sales or use tax on all of its taxable sales into this state and file all required returns. Upon request, the Department will waive failure to file and deficiency penalties for returns and payments due prior to December 31, 2018, if the taxpayer incurring those penalties is required to pay Michigan sales tax solely based on its economic activity in the state (i.e., no physical presence); interest will not be waived. Sellers with a physical presence in Michigan, or sellers required to pay sales or use tax under MCL 205.52b or 205.95a, must also pay Michigan sales tax on all Michigan sales even if they do not exceed either of the new economic thresholds.

For more information regarding the new policy please visit https://www.michigan.gov/remotesellers

# Simplified Sales and Use Tax Refund Procedures Coming in 2019

Under the Michigan Sales and Use Tax Acts, purchasers who mistakenly failed to claim an available exemption at the time of purchase have historically been unable to claim a refund of the tax paid from Treasury. Indeed, only the person that actually collected and remitted the tax – the seller – could claim a refund. This necessitated a complicated refund procedure in which purchasers had to request tax reimbursement from the seller who, after documenting that the tax reimbursement was actually paid, could then claim a refund of the tax from Treasury. This claims procedure and its reliance on the interactions between the purchaser, seller and Treasury proved to be a cumbersome process for what was otherwise a standard refund claim.

To simplify this process, 2018 PA 168 created a new avenue for purchasers to claim a refund of tax from Treasury. Effective January 1, 2019, a purchaser may request a refund directly from Treasury in circumstances where that purchaser failed to present a claim of exemption or otherwise notify the seller of an available exemption at the time of purchase. Because this new procedure applies only in the event the purchaser failed to claim an available exemption in the original transaction, it does not apply to other potential refund claims by purchasers. For example, refund claims related to returns of tangible personal property upon which tax was paid or refund claims related to retroactive changes in law will not be eligible for this new procedure.

For eligible purchasers, the refund claim is timely if made within 4 years from the date of purchase.

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To support the refund claim, the purchaser is required by statute to submit certain documentation, including:

- An accurate record of the purchase that includes the date of the purchase and the amount of sales tax originally paid;
- A proper exemption claim; and
- A Treasury form that provides information needed by Treasury to substantiate the refund claim and that also contains a signed statement by the seller indicating that the seller paid tax on the original transaction and has not, and will not, seek a refund of that tax.

Treasury is currently in the process of creating a standard form for sellers to report the tax information for the transaction at issue and to affirm that no refund has, or will be, claimed in the future. This form will be made available to taxpayers beginning January 1, 2019.

The new claims procedure is effective only beginning January 1, 2019. Any refund claims made prior to that date remain subject to existing law and, consequently, can only made by the seller who collected and remitted the tax. Refund claims from purchasers received prior to January 1, 2019, will be denied. Purchasers who choose to wait until January 1, 2019, to file refund claims with Treasury should consider the application of the statute of limitations to their claims.

Taxpayers should monitor Treasury's website at www.michigan.gov/taxes and future editions of this newsletter for additional updates.


# Recently Issued Guidance from Treasury

***Revenue Administrative Bulletins***

**RAB 2018-12**

Corporate Income Tax, Unitary Business Group Control Test and Relationship Tests

**RAB 2018-16**

Sales and Use Tax Nexus Standards for Remote Sellers

***Notices to Taxpayers***

Notice Regarding Amendments to the Taxpayer Bill of Rights Rules, June 8, 2018

Update to Michigan State Real Estate Transfer Tax Refunds for Transfers from June 24, 2011 to Present, June 26, 2018

Corporate Income Tax Guidance on Federal "Tax Cuts and Jobs Act," July 2, 2018

Notice to Remote Sellers Regarding Sales Tax and *South Dakota v Wayfair,* August 1, 2018

Notice Regarding Michigan Taxes on Illegal Activities September 13, 2018

Revenue Administrative Bulletins (RAB) can be found on the website at www.michigan.gov/treasury under the ***Reports and Legal Resources*** tab.

## Statement of Acquiescence/ Non-Acquiescence Regarding Certain Court Decisions

*In each issue of the quarterly Treasury Update, Treasury will publish a list of final (unappealed), non-binding, adverse decisions issued by the Court of Appeals, the Court of Claims and the Michigan Tax Tribunal, and state its acquiescence or non-acquiescence with respect to each. The current quarterly list applying Treasury's acquiescence policy appears below. "Acquiescence" means that Treasury accepts the holding of the court in that case and will follow it in similar cases with the same controlling facts. However, "acquiescence" does not necessarily indicate Treasury's approval of the reasoning used by the court in that decision. "Non-acquiescence" means that Treasury disagrees with the holding of the court and will not follow the decision in similar matters involving other taxpayers.*

ACQUIESCENCE:
No cases this quarter.

NON-ACQUIESCENCE:
No cases this quarter.

*Archives of Treasury Update can be found on the website at* [Michigan.gov/Treasury](Michigan.gov/Treasury) *under the* ***Reports and Legal Resources*** *tab.*

# Health Insurance Claims Assessment Act To Be Replaced By Insurance Provider Assessment Act

On June 11, 2018, legislation creating a new multi-tiered health insurance tax was signed into law by Governor Snyder. Specifically, 2018 PA 175 ("PA 175") creates the Insurance Provider Assessment Act ("IPAA"), which institutes a new health care-related tax incorporating both a fixed and variable rate structure. A companion act, 2018 PA 173, repeals the current Health Insurance Claims Assessment Act ("HICAA") as of the date that the assessment under the IPAA begins to be levied, and a second companion act, 2018 PA 174, eliminates a provision of the Use Tax Act that would have reinstated the Medicaid managed care use tax on July 1, 2020, the date that HICAA was previously scheduled to sunset.

The IPAA will apply at varying rates to non-Medicaid health insurers, prepaid inpatient health plans (providers of Medicaid behavioral health services) and Medicaid managed care services. The revenue produced by the IPAA will support Michigan's Medicaid program.

For purposes of calculating federal Medicaid reimbursement, federal law requires state health care-related taxes to be both "broad-based" and "imposed uniformly." However, states are permitted to submit waiver applications requesting that a specified health care-related tax be treated as broad-based and uniform if the tax at issue can meet certain complex statistical thresholds that are outlined in federal regulations. These statistical tests are intended to ensure states do not structure health care-related taxes that place a disproportionate amount of tax liability onto Medicaid providers. If the tax at issue meets the stated statistical thresholds, the federal Medicaid authorities are required to approve the waiver.

The IPAA is intended to meet these statistical thresholds. The act therefore requires the Michigan Department of Health and Human Services ("DHHS") to request from the federal Medicaid authorities a waiver of the broad-based and uniformity provisions governing state health care-related taxes, for a period of at least 5 years. The assessment imposed by the IPAA will not begin to be levied until the first day of the calendar quarter in which DHHS provides written notice to Treasury that the federal waiver permitting implementation of the IPAA has been approved, or October 1, 2018, whichever is later. Accordingly, it is important to note the new tax will not be implemented immediately, and HICAA remains in place until the

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IPAA assessment has been implemented and begins to be levied upon providers. Treasury will publish on its website a taxpayer notice containing additional information about the transition to the IPAA shortly after the notification of waiver approval from DHHS has been received.

The tax imposed by the IPAA is levied upon the number of "member months" reported by each "insurance provider" for the previous calendar year. The IPAA defines a "member month" as the total number of individuals for whom an insurance provider has recognized revenue for one month. An "insurance provider" is defined as a Medicaid managed care organization or a health insurer. "Health insurer" means an insurer authorized under Michigan's insurance code to issue health insurance policies in this state. The definition includes health maintenance organizations but specifically excludes self-insured entities.

The new tax will be levied at both variable and fixed rates, according to three rate tiers. The Tier 1 rates will apply to the member months of Medicaid contracted health plans supported with federal Medicaid funds, the Tier 2 rate will apply to health insurers' member months not supported with federal Medicaid funds, and the Tier 3 rate will apply to the member months of specialty prepaid health plans supported with federal Medicaid funds.

Information with respect to the insurance providers that will be subject to the new tax, the number of member months to be assessed, and the rate to be imposed on those member months will be provided to Treasury by DHHS and by the Department of Insurance and Financial Services, and will be based upon regulatory filings made by the providers.

For the initial year of assessment as well as succeeding years, the IPAA mandates that Treasury calculate the actual assessment due from each insurance provider based on that provider's reported member months from the previous calendar year. Treasury is then required to notify each insurance provider of the assessment amount that will be due the next year. Assessments will be payable in quarterly installments.

The IPAA will be administered by Treasury under the Revenue Act and Treasury expects to promulgate such administrative rules as may be necessary to implement the act. Treasury may issue additional taxpayer guidance regarding the IPAA in the form of FAQs or more formal guidance, as necessary.

Again, note that the new tax will not be implemented immediately, and HICAA remains in place until the IPAA assessment has been implemented and begins to be levied upon providers. Treasury will publish on its website a taxpayer notice containing additional information about the transition to the IPAA shortly after the notification of waiver approval from DHHS has been received.

## About *Treasury Update*

***Treasury Update*** *is a periodic publication of the Tax Policy Division of the Michigan Department of Treasury.*

*It is distributed for general information purposes only and discusses topics of broad applicability. It is not intended to constitute legal, tax or other advice. For information or advice regarding your specific tax situation, please contact your tax professional.*

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# Court of Appeals Upholds *Old Orchard*: Tolling Applies to Audits Started on or Before September 30, 2014

The June 2017 issue of *Treasury Update* announced the Court of Claims' decision in favor of the Department in *Old Orchard Brands LLC v Dep't of Treasury*, which held that, because tolling of the statute of limitations for state audits was in effect under section 27a(3) at the time the audit began, tolling applied to calculate the limitations period applicable to the final assessment issued to Old Orchard. Shortly thereafter, Old Orchard appealed the decision to the Court of Appeals. The Court of Appeals consolidated the case with two others and on May 22, 2018, affirmed the Court of Claims in a published decision.

As a reminder, Public Act 3 of 2014 (PA 3) changed the way the statute of limitations applies for state audits. Before the enactment of PA 3, the limitations period was tolled during the audit and then restarted at the audit's conclusion, remaining open for the balance of the limitations period plus one year. PA 3 eliminated tolling for state audits and significantly shortened the time for conducting them. For audits started after September 30, 2014, the limitations period is generally extended only for the length of time beyond the limitations period that it takes to issue a preliminary audit determination (PAD) but no longer than one year. An additional extension of nine months is permitted for issuance of the assessment if the PAD is issued timely. PA 3, which went into effect February 6, 2014, was silent about which version of the statute controlled Treasury audits initiated before September 30, 2014.

In affirming the Court of Claims in *Old Orchard*, the Court of Appeals held that the legislative silence regarding audits commenced on or before September 30, 2014, reflected an intent to allow tolling in those cases. It reasoned that the necessary corollary of providing for extensions of the limitations period for audits commenced after September 30, 2014, is that audits commenced on or before that date remain subject to tolling.

The taxpayers have sought leave to appeal to the Michigan Supreme Court.

# Federal Tax Reform Affects The Michigan Net Operating Loss For Individual Income Taxpayers

The May 2016 *Treasury Update* explained the Michigan net operating loss (NOL) deduction and some common errors to avoid in computing and claiming the deduction. This article highlights some changes to the deduction from the federal tax reform signed into law at the end of 2017, which result from Michigan's piggyback on the federal NOL provision. The changes apply to tax years 2018 through 2025.

The amendments to the Internal Revenue Code made by the popularly-named Tax Cuts and Jobs Act include a limitation of $250,000 on the deduction of business losses for single filers ($500,000 for married taxpayers filing jointly). Business losses exceeding the new cap are considered excess business losses and are carried over to future years and treated as an NOL under the federal NOL provision. These limits also apply to non-corporate farmers.

Additionally, the federal amendments limit a taxpayer's current tax year NOL deduction to the lesser of the total aggregated NOL carryover or 80% of taxable income, computed without regard to the NOL deduction. Federal reform also eliminated the carryback provisions for nonfarmers, reduced the carryback from three to two years for farmers, and permited indefinite carryforward of NOLs created during the applicable tax years.

Treasury is awaiting Internal Revenue Service guidance regarding the treatment of the changes before a final determination is made regarding the Michigan treatment. However, Treasury expects to issue an updated version of the MI-1045, Application for Michigan Net Operating Loss Refund and possibly new forms and worksheets. Taxpayers are advised to watch Treasury's website for the announcement of new and updated forms and to pay special attention to selecting forms for the appropriate year since the carryback and carryforward provisions have changed for tax years 2018 through 2025.

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**ADMINISTER**
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*online, public financial information for local government and schools*


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**CONNECT**
*students and families with scholarships, grants and college savings programs*

**RECONNECT**
*individuals and businesses with their money and other properties through Unclaimed Property*

**COLLECT, DISBURSE**
*and INVEST all state monies*

Michigan Department of
TREASURY

## Limited Use Tax Exemption for Contractors Acquiring Property from Others for Affixation to Real Estate Enacted into Law

Michigan recently enacted 2018 PA 201 (Act) to add section 4ee to the Use Tax Act. This new section of the Use Tax Act provides an exemption to a person engaged in the business of constructing, altering, repairing, or improving real estate for others (Contractor) regarding tangible personal property acquired from another person (Property) if certain conditions are satisfied.

Specifically, a Contractor is not liable for use tax under the Act for storing, using or consuming the Property as long as all of the following three conditions are satisfied:

- The Property was purchased by that other person
- That other person is not exempt from either Michigan sales tax or Michigan use tax
- The Property was acquired by the Contractor for the sole purpose of affixing the Property to real estate on behalf of that other person

The Department intends to update its formal guidance applicable to Contractors to reflect the changes to the Use Tax Act resulting from the Act.

For more information regarding the Act, visit the Legislature's web page at [www.legislature.mi.gov.](http://www.legislature.mi.gov)



# State Real Estate Transfer Tax: Amendment to Exemption (u)

In general, the transferor of any interest in real property must pay state real estate transfer tax (SRETT), unless an exemption applies. One of the most common exemptions is MCL 205.526(u), which provided an exemption for transfers where (1) the seller claimed a principal residence exemption (PRE) on the property, (2) the state equalized value (SEV) of the property at the time of the transfer was less than or equal to the SEV at the time it was purchased, and (3) the sale was an arms-length transaction.

However, in the past, when a vacant parcel was purchased and a residence was constructed after the purchase, the SEV of the property would remain throughout the year as it was valued for the vacant parcel. After construction of a residence, the SEV would increase due to the construction. In this scenario, the subsequent transfer of the residence would never qualify for exemption "(u)" – even in a declining market – since the value at the time of transfer would always be greater than the SEV of the vacant parcel.

2018 PA 172 was recently enacted to amend exemption "(u)" to address this gap in the statute. Specifically, the provision regarding the SEV now requires the SEV of the subject property to be less than or equal to the SEV as of the first Tax Day (December 31) after the issuance of a certificate of occupancy for the residence or the date the residence was acquired, whichever is later. This presumably expands the scope of exemption "(u)" to address the scenario described above.

The amendment is retroactive, but limited by the statute of limitations in MCL 205.27a. If a taxpayer previously requested a refund based on the scenario PA 172 is meant to address and was denied, the taxpayer may submit another request.

# *Ford Motor Co v Dep't of Treasury*

**Appeals court rules that Treasury has discretionary authority to require substantiating evidence beyond the minimum information required under the refund provisions of the Motor Fuel Tax Act (MFTA)**

In the recent case *Ford Motor Co v Dep't of Treasury,* the Michigan Court of Appeals affirmed the Court of Claims' grant of summary disposition in favor of Treasury related to Treasury's denial of Ford's motor fuel tax refund in excess of the portion already approved by Treasury. The case involved motor fuel tax refund claims for motor fuel placed into newly-manufactured vehicles destined for export outside Michigan for testing, quality control, and transportation purposes.

Although key aspects of this case were controlled by the Court's decision in *Auto Alliance Int'l, Inc v Dep't of Treasury*, 282 Mich App 492 (2009), this is the first opinion of the Court of Appeals addressing the distinct issue of substantiation of a refund claim.

Treasury asserted that Ford was required to provide computer fuel specification sheets or similar documentation to demonstrate how much fuel (in excess of Treasury's standard allowance of 3.2 gallons of motor fuel per vehicle - established in response to the Auto Alliance decision) was placed in the specific vehicle models during the tax periods for which the refunds were claimed.  Ford argued that affidavits it submitted (in lieu of the fuel specification sheets) were sufficient to establish the amount of fuel Ford claimed to have placed into each vehicle and that Treasury did not have the authority to dictate what evidence substantiates a refund claim beyond the express requirements of MFTA'srefund  provision – MCL 207.1048.

The Court rejected Ford's argument since the plain language of the statute grants Treasury the authority (although not unfettered) to investigate a refund claim and determine what documentation is adequate for substantiation of that claim.

On review of the record, the Court ruled that the Court of Claims was correct in finding that the evidence presented by Ford was insufficient to support its entitlement to a refund beyond the 3.2 gallons per vehicle amount Treasury granted. Notably, the Court pointed out that Ford previously had within its possession the documentation necessary to substantiate its claims, but admitted that it failed to retain that documentation due to its own record retention protocols.

The Court also rejected Ford's argument that MCL 207.1048 is an impermissible delegation of legislative powers to Treasury, Ford's challenge based on constitutional due process grounds, and Ford's assertion that the Administrative Procedures Act applied.

**Both Treasury and Ford contended their respective positions were supported by MCL 207.1048, which states, in relevant part:**

In order to make a refund claim under this act, a person shall do all of the following:

(a) File the claim on a form or in a format prescribed by the department.

(b) Provide the information required by the department including, but not limited to, all of the following:

(i) The total amount of motor fuel purchased based on the original invoice unless the department waives this requirement.

(ii) The total amount of tax paid.

(iii) A statement that the fuel was used for an exempt purpose or by an exempt user.

(iv) A statement that the fuel was paid for in full.

(v) A statement printed on the form that the claim is made under penalty of perjury.

(c) Comply with any specific requirement described in sections 32 to 47.

(d) Sign the claim.

(e) File the claim not more than 18 months after the date the motor fuel was purchased.

## Rolling Stock Use Tax Exemption Primary Business Purpose Must be Transport for Hire Across State

In *Midwest Power Line, Inc v Department of Treasury, ___ Mich App___(2018)*, the Michigan Court of Appeals ruled that the taxpayer could not claim a rolling stock use tax exemption for its trucks. The taxpayer's trucks crossed state lines while carrying poles, transformers and other equipment owned by utility companies but used by the taxpayer to do emergency repairs for the companies.

The court held that the Use Tax Act exemption for rolling stock used in interstate commerce by an interstate fleet motor carrier is only available to a taxpayer whose primary business purpose is transporting people or property for hire across state lines. The taxpayer could not claim the tax exemption because the transport of customers' property across state lines was incidental to its primary purpose of providing repair services.

# Michigan Supreme Court Rules on Bad Debt

Michigan's sales and use tax acts include a provision that allows a taxpayer to recover taxes remitted on financed sales when the sales/purchase price is not fully recovered from the purchaser and the transaction is written off as a bad debt for federal income tax purposes. In *Ally Fin Inc et al v Dep't of Treasury,*____Mich__(2018), the Michigan Supreme Court ruled on three issues regarding the proper application of the bad debt deduction.

First, the Court held that the exclusion of repossessed property from the deduction did not prohibit the taxpayers from recovering tax remitted on unrecovered amounts from repossessed property. Thus, to the extent there was a deficiency on a loan remaining after repossession and sale of the property, the taxpayer is entitled to claim the bad debt deduction on those uncollected amounts.

Second, the Court held that the bad debt deduction grants Treasury broad authority to determine what documentation is sufficient to establish a valid bad debt claim. Specific to this case, the Court found that the Department may require a taxpayer to provide validated RD-108s to prove sales tax was paid on vehicle transactions. A validated RD-108 is a Secretary of State form that indicates that it collected sales tax on a vehicle sale.

Finally, the Court held that the requirement that a retailer and lender enter into a written election regarding which party may claim the deduction is satisfied even if the election is made after the bad debts have been written off of the taxpayer's books. The Court reasoned that these accounts still exist in that the taxpayer would still collect on them if given the opportunity.

Because factual issues remain regarding substantiation of the refund amounts, the case was remanded to the Court of Claims for resolution.

# *Tomra of N America, Inc v Dep't of Treasury*

## Appeals court rules on the scope of the industrial processing exemptions in the sales and use tax acts.

In a 2-1 published decision issued by the Michigan Court of Appeals on July 17, 2018, in the matter of *Tomra of N America v Dep't of Treasury* (Docket Nos. 336871 and 337663), the majority reversed the Court of Claims' grant of summary disposition in favor of Treasury and remanded the case back to the Court of Claims for further proceedings.

Tomra appealed Treasury's denial of its refund request for sales and use taxes from its sales of reverse vending machines (bottle return machines) and use of repair parts for those machines based on the industrial processing exemptions under MCL 205.54t and MCL 205.94o.

The majority rejected Treasury's argument that the explicit definitions of "industrial processing" in MCL 205.54t(7)(a) and MCL 205.94o(7)(a), which state that "[industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing …," establish a temporal requirement that must be met before any activity (whether described in those definitions or enumerated under MCL 205.54t(3) or MCL 205.94o(3)) can constitute exempt industrial processing.

The majority concluded that the statute "does not say that industrial processing *must* begin this way, but rather that when tangible personal property begins movement from raw materials storage to begin industrial processing, one can rest assured that industrial processing has begun."  Accordingly, the majority determined that activities that fall within the enumerated list under MCL 205.54t(3) and MCL 205.94o(3) may qualify for the industrial processing exemption regardless whether there is "movement from raw material storage" as purportedly required under MCL 205.54t(7)(a) and MCL 205.94o(7)(a) in order to constitute "industrial processing."

The dissent followed the Court of Claims, finding the machines are not engaged in "industrial processing" because they "simply facilitate the collection of raw materials" and, therefore, "perform activities before the industrial process begins" under MCL 205.54t(7)(a) or MCL 205.94o(7)(a).

Treasury has filed Applications for Leave to Appeal with the Michigan Supreme Court in these matters seeking reversal of the Court of Appeals decision.

## Need Assistance?

For further assistance with reissuing refunds or rectifying other issues, contact Treasury's Income Tax Information line at 517-636-4486.

Please note the Office of the Taxpayer Advocate does not check the status of current year tax returns.

For other Frequently Asked Questions, please refer to www.michigan.gov/treasury