STATE OF MICHIGAN

COURT OF APPEALS

HARLEY DAVIDSON MOTOR COMPANY, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

UNPUBLISHED
March 15, 2016

No. 325498
Court of Claims
LC No. 13-000158-MT

DUN & BRADSTREET, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325499
Court of Claims
LC No. 13-000085-MT

DUN & BRADSTREET, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325500
Court of Claims
LC No. 12-000125-MT

L'OREAL USA, INC. & SUBSIDIARIES,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326130
Court of Claims
LC No. 14-000174-MT

L'OREAL USA, INC. & SUBSIDIARIES,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326131
Court of Claims
LC No. 14-000178-MT

SKADDEN, ARPS, SLATE, MEAGHER, & FLOM, LLP,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326135
Court of Claims
LC No. 14-000296-MT

EASTON TELECOM SERVICES, LLC,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326862
Court of Claims
LC No. 15-000068-MT

ANHEUSER BUSCH, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327057
Court of Claims
LC No. 11-000085-MT

INTUITIVE SURGICAL, INC.,

Plaintiff-Appellant/Cross-Appellee,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee/Cross-Appellant.

No. 327178
Court of Claims
LC No. 15-000012-MT

T-MOBILE USA, INC. AND SUBSIDIARIES,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327217
Court of Claims
LC No. 15-000071-MT

GENERAL ALUMINUM MFG COMPANY AND AFFILIATES,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327218
Court of Claims
LC No. 15-000021-MT

CONAIR CORPORATION AND SUBSIDIARIES,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327220
Court of Claims
LC No. 15-000007-MT

CONAIR CORPORATION AND SUBSIDIARIES,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327222
Court of Claims
LC No. 15-000072-MT

JOHNSON MATTHEY, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327694
Court of Claims
LC No. 14-000269-MT

MCNEIL-PPC, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327964
Court of Claims
LC No. 12-000143-MT

FLUOR CORPORATION & SUBSIDIARIES,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327995
Court of Claims
LC No. 12-000147-MT

DIRECTV,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 328193
Court of Claims
LC No. 13-000092-MT

SOLO CUP OPERATING CORPORATION,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 328206
Court of Claims
LC No. 13-000062-MT

CONAGRA FOODS, INC. AND SUBSIDIARIES,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 328317
Court of Claims
LC No. 15-000120-MT

BOISE, INC.,

Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 328967
Court of Claims
LC No. 15-000133-MT

Before: GLEICHER, P.J., and MURPHY and OWENS, JJ.

PER CURIAM.

In these 20 consolidated appeals, plaintiff-taxpayers challenge the Court of Claims' summary dismissal of their actions seeking tax refunds. Specifically, each plaintiff is a corporation that earns income in many states and made use of the elective three-factor apportionment formula in the Multistate Tax Compact to which Michigan previously adhered. With the passage of 2014 PA 282, the Legislature clarified that its enactment of the Michigan Business Tax Act (MBTA), 2007 PA 36, withdrew the state from the compact and created a single-factor apportionment formula. 2014 PA 282 provided for retroactive application to 2008.

Plaintiffs challenge the validity and constitutionality of 2014 PA 282. However, this Court rejected identical arguments in *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, ___ Mich App ___; ___ NW2d ___ (Docket No. 325258 *et al*, issued September 29, 2015). Certain parties raise other challenges that also lack merit. We affirm.

I. BACKGROUND

As discussed by this Court in *Gillette*, slip op at 14, the Multistate Tax Compact was enacted in 1967 by the legislatures of seven states, including Michigan. Of relevance to this case is the method of income apportionment described in the Compact:

> The present case, and others like it, concern two alternative methods of apportioning income for purposes of calculating MBT [Michigan business tax]. Under the [MBTA], created by 2007 PA 36, income is apportioned by applying a single factor apportionment formula based solely on sales. MCL 208.1301(2). In contrast, under the Compact's election provision, income may be apportioned using an equally-weighted, three-factor apportionment formula based on sales, property and payroll. The potential effect of electing "out" of the [MBTA's] single-factor apportionment methodology is a reduction of the overall apportionment percentage for companies that do not have significant property and payroll located in Michigan. [*Id.*]

On July 14, 2014, our Supreme Court issued its opinion in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) (*IBM*). In *IBM*, the Court considered whether the enactment of the MBTA required taxpayers to use the single-factor apportionment methodology or whether taxpayers could continue to opt into the three-factor Compact method. *Gillette*, slip op at 14-15. As summarized in *Gillette*, slip op at 15, the Supreme Court

> determined that for tax years 2008 through 2010, the Legislature did not repeal by implication the three-factor apportionment formula as set forth in MCL 205.581 *et seq.*, and concluded that the taxpayer was entitled to use the Compact's three-factor apportionment formula in calculating its 2008 taxes. The Court also concluded that both the business income tax base and the modified gross receipts tax base of the MBT are "income taxes" within the meaning of the Compact.

The Legislature responded by enacting 2014 PA 282 on September 11, 2014. The act specifically indicated that 2007 PA 36 eliminated the statutory provision permitting taxpayers to elect into the Compact's three-part apportionment methodology and made the 2014 enactment retroactive to January 1, 2008. *Gillette*, slip op at 15.

Each plaintiff in the current appeals desired to use the three-part apportionment formula to calculate their Michigan income tax liability between 2008 and 2010. They filed suit in the Court of Claims seeking a refund of the excess taxes they were required to pay under the MBTA's single-factor formula. The Court of Claims summarily dismissed that portion of each plaintiff's action.

II. CONSTITUTIONALITY OF 2014 PA 282

In all the consolidated appeals, plaintiffs contend that they should have been permitted to apportion their income using the three-factor Compact method and assert that 2014 PA 282 violates the Compact, as well as the contracts, due process, separation of powers, commerce, and title-object clauses of the Michigan and federal constitutions and the five-day rule articulated in Const 1963, art 4, § 26. Accordingly, they contend that the Court of Claims should not have dismissed their refund counts.

We review de novo the grant of summary disposition under MCR 2.116(I)(1). *Gillette*, slip op at 16. MCR 2.116(I)(1) states: "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." We also review de novo underlying issues of statutory interpretation and the resolution of constitutional issues. *Gillette*, slip op at 16.

Plaintiffs' arguments are identical in all relevant respects to those raised in *Gillette*. This Court rejected the plaintiffs' myriad challenges in *Gillette*, and we are bound by that ruling. MCR 7.215(C)(2). In particular, this Court held that the Compact was an advisory, not binding, agreement. Accordingly, 2014 PA 282's removal of Michigan from membership in the Compact was not prohibited and no contractual violation occurred. For the same reason, this Court found no violation of the Contract Clauses of either the federal or state constitutions. *Gillette*, slip op at 21.

This Court held that "the retroactive repeal of the Compact did not violate the Due Process Clauses of either the state or federal constitutions or Michigan's rules regarding retrospective legislation. Nor did it violate the terms of the Compact itself." *Id*. at 22. "First, plaintiffs had no vested right in the tax laws or in the continuance of any tax laws." *Id.* at 25. Second, "the Legislature had a legitimate purpose for giving retroactive effect to 2014 PA 282": to "prevent a reduction in General Fund revenue of $1.1 billion." *Id.* at 25-26 (emphasis omitted). And the means selected were rationally related to the goals to be achieved. *Id.* at 26. Third, this Court concluded, the Legislature acted promptly following the *IBM* decision to correct the error perceived by the Supreme Court. Finally, this Court reasoned that the 6.5-year retroactive period "was sufficiently modest to time frames of other retroactive legislation" that had been upheld by appellate courts in the past. *Id.*

Gillette found no violation of the Separation of Powers clauses of either the federal or the state constitutions. The Legislature has the constitutional power to enact legislation to correct judicial misconceptions about the meaning of a law. *Id.* at 28, 30. This Court discerned no discrimination or undue burden placed on interstate commerce that would violate the United States Constitution's Commerce Clause. *Id*. at 31-32. This Court further found no violation of Michigan's Title-Object Clause, *id.* at 35-38, or the Michigan constitutional rule requiring that a bill be before each legislative house for a minimum of five days. *Id.* at 39.

As each challenge was raised, considered and resolved by this Court in *Gillette*, no new issues remain for our review. Accordingly, we discern no ground to overturn the dismissal of plaintiffs' refund claims. Nor are we convinced by plaintiffs' argument that we should express disagreement with *Gillette* and invoke the process for convening a special panel. See MCR 7.215(J)(2), (3). The plaintiffs' applications for leave to appeal in *Gillette* are currently pending before the Michigan Supreme Court. That appellate proceeding is sufficient to resolve the legal questions presented.

III. MODIFIED GROSS RECEIPTS

In Docket No. 327057, plaintiff Anheuser Busch, Inc. (Anheuser) argues that the predecessor Court of Claims judge erred in concluding that the Modified Gross Receipts Tax (MGRT) portion of the MBTA was not an "income tax" under the Compact's definition of that term. Anheuser contends that the MGRT is in fact an income tax under the Compact and therefore subject to the elective three-factor apportionment formula. Pursuant to *IBM*, 496 Mich at 663 (VIVIANO, J.), Anheuser would have been correct. Yet, we need not reach this issue. As 2014 PA 282 clarifies, Michigan has withdrawn from the Compact and its definitions no longer have relevance in apportioning one's income under Michigan tax law. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998) ("As a general rule, an appellate court will not decide moot issues. A case is moot when it presents only abstract questions of law that do not rest upon existing facts or rights. An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief.").

IV. PENALTY WAIVERS

In Docket Nos. 327995 and 328206, plaintiffs Fluor Corporation & Subsidiaries (Fluor) and Solo Cup Operating Corporation (Solo Cup) presented their requests for penalty waivers

before the Court of Claims. Plaintiffs were penalized because they made inadequate quarterly tax payments in 2008. Plaintiffs assert that their estimates were reasonable given the uncertain state of the law that year, excusing the shortfall. The Court of Claims dismissed plaintiffs' counts in this regard.

The Court of Claims granted defendant's motions for summary disposition of this issue under MCR 2.116(C)(10). In reviewing a (C)(10) motion, we consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We review underlying issues of statutory interpretation, and interpretation of administrative rules, de novo. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007). Unambiguous statutory and administrative rule language must be enforced as written in accordance with its plain meaning. *Id*.

Under the MBTA, which was repealed effective May 25, 2011, a taxpayer who reasonably expected to pay taxes in excess of $800 for the tax year was required to file an estimated return and to pay an estimated tax for each quarter of the tax year. MCL 208.1501(1), repealed by 2011 PA 39. Each quarterly estimated payment was to "be for the estimated business income tax base and modified gross receipts tax base for the quarter or 25% of the estimated annual liability." MCL 208.1501(3), repealed by 2011 PA 39. Defendant is statutorily required to assess a penalty when a taxpayer fails to make a sufficient estimated payment. See MCL 205.23(2) ("A deficiency in an estimated payment as may be required by a tax statute administered under this act shall be treated in the same manner as a tax due. . . ."); MCL 205.24(2) (requiring defendant to assess a penalty when a taxpayer fails or refuses to file a return or pay a tax).

MCL 205.24(4) provides for the waiver of a penalty as follows:

> If a return is filed or remittance is paid after the time specified and it is shown to the satisfaction of the department that the failure was due to reasonable cause and not to willful neglect, the state treasurer or an authorized representative of the state treasurer shall waive the penalty prescribed by [MCL 205.24(2)].

Mich Admin Code, R 205.1013 sets forth the procedure for requesting a penalty waiver, in relevant part, as:

> (2) If a return is filed or a remittance is paid after the time specified, the taxpayer may request that the commissioner of revenue waive and the commissioner shall waive the penalty authorized by [MCL 205.24(4)] if the taxpayer establishes that the failure to file the return or to pay the tax was due to reasonable cause and not to willful neglect.

> (3) A waiver of penalty request shall be in writing and shall state the reasons alleged to constitute reasonable cause and the absence of willful neglect.
>
> (4) The taxpayer bears the burden of affirmatively establishing, by clear and convincing evidence, that the failure to file or failure to pay was due to reasonable cause.

Although each case must be evaluated individually, defendant has provided a list of examples that generally constitute reasonable cause and a list of factors that may establish reasonable cause when considered with other circumstances. See Mich Admin Code, R 205.1013(7), (8).

In Docket No. 327995, Fluor acknowledges that it underpaid its quarterly estimated taxes in 2008, but contends, for the first time on appeal, that this was due to uncertainty regarding the MBT, which had at that point only recently been enacted. Fluor asserts that defendant initially failed to provide guidance regarding the MBT because defendant did not release tax forms and instructions for the 2008 tax year until November 2008. Fluor also says that it was not negligent in electing to use the Compact's apportionment formula.

As Fluor did not raise this specific challenge until its appellate brief, there is no record supporting its claim. Defendant, on the other hand, replied to this new argument by appending to its appellate brief the instructions it published in December 2007, explaining when estimated quarterly payments were due, how the estimates were to be calculated, and the penalty for not making the payments. We arguably cannot consider this document because it is not in the lower court record. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal."). Had Fluor raised this claim in a timely manner, defendant likely would have presented these instructions below. And pursuant to MRE 201, we may take judicial notice of facts that can be readily confirmed by sources whose accuracy cannot reasonably be questioned. Given this unrebutted evidence, the Court of Claims would have had no choice but to reject Fluor's challenge. In any event, parties are presumed to know the law, *Mudge v Macomb Co*, 458 Mich 87, 109 n 22; 580 NW2d 845 (1998), and Fluor has alleged no facts or law to overcome this fundamental principle.

Fluor further contends that it acted with reasonable cause and not willful neglect in choosing to calculate its 2008 quarterly tax payments using the three-factor Compact apportionment formula. However, as aptly noted by the Court of Claims, "according to the record, the penalty was based solely on the underpayment of total tax liability for 2008 as reported by plaintiff," not the taxpayer's apportionment method. Although defendant adjusted the number upward, Fluor reported a total tax liability using the Compact formula of $2,613,151.00. Pursuant to former MCL 208.1501(3), Fluor's quarterly payments should have been $653,287.75. Fluor's payments were all under $200,000, an excessive shortfall warranting the penalty imposed regardless of the calculation method.

In Docket No. 328206, Solo Cup argues that the Court of Claims erroneously concluded that it failed to exhaust its administrative remedies by petitioning defendant for a penalty waiver before filing suit. According to Solo Cup, there is no exhaustion of remedies requirement in the Revenue Act, and such a requirement would be at odds with the statutory provision requiring a

taxpayer to file an appeal in the Court of Claims within 90 days after the assessment, decision, or order. See MCL 205.22(1). Solo Cup also contends that nothing in MCL 205.24(4) requires a taxpayer to submit a written request for a waiver of penalty and that Rule 205.1013(3) does not provide that a penalty waiver request must be submitted before filing suit in the Court of Claims. Even if a written waiver request were required, Solo Cup claims that its Court of Claims complaint qualifies as such a written request.

"The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court." *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009). Nonetheless, if "it is clear that appeal to an administrative body is an exercise in futility and nothing more than a formal step on the way to the courthouse, resort to the administrative body is not required." *Turner v Lansing Twp*, 108 Mich App 103, 108; 310 NW2d 287 (1981); see also *Manor House Apartments v City of Warren*, 204 Mich App 603, 605; 516 NW2d 530 (1994). "[C]ourts should not presume futility in an administrative appeal but should assume that the administrative process will, if given a chance, discover and correct its own errors." *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 52; 620 NW2d 546 (2000) (quotation marks omitted); see also *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358; 733 NW2d 107 (2007).

MCL 205.24(4) contemplates the submission of a waiver request *to defendant* by stating that a waiver shall be granted if "it is shown *to the satisfaction of the department* that the failure was due to reasonable cause and not willful neglect[.]" (Emphasis added.) Rule 205.1013 prescribes in further detail that the taxpayer must file a written request stating the reasons alleged to constitute reasonable cause and the absence of willful neglect and articulates that the taxpayer has the burden of establishing reasonable cause by clear and convincing evidence. Because defendant provides a remedy to taxpayers seeking a penalty waiver, Solo Cup was required to seek such relief before petitioning the Court of Claims. *Cummins*, 283 Mich App at 691.

Solo Cup's Court of Claims complaint did not fulfill the statutory and rule notice requirements. The complaint sought action from the court, not defendant, and sought to satisfy the court, not defendant, that the taxpayer's quarterly payments were reasonably calculated. Solo Cup's suggestion that it lacked sufficient time to pursue the administrative remedy in light of the 90-day time limit for filing an appeal in the Court of Claims is conjectural. It could have filed the waiver request and if a response was not forthcoming, it could have filed the Court of Claims action. Courts will not presume that an administrative appeal would have been futile. *Citizens for Common Sense in Gov't*, 243 Mich App at 52. A party's speculation about the outcome of an administrative remedy does not excuse the obligation to exhaust that remedy. *Id*. at 54.

Solo Cup relies on *Montgomery Ward & Co, Inc v Dep't of Treasury*, 191 Mich App 674; 478 NW2d 745 (1991), to support its argument, but that case in inapposite. *Montgomery Ward* involved a taxpayer's judicial appeal of a tax assessment. The statute at issue in that case included specific steps to perfect court jurisdiction. As the taxpayer had taken those steps, the court had jurisdiction over the case. Here, the taxpayer did not jump through the hurdles outlined in the relevant statutes and administrative rules. Therefore, the taxpayer failed to exhaust the available administrative remedies and the suit was premature.

V. SUBJECT MATTER JURISDICTION

The matter underlying Docket No. 327178 has a slightly different procedural history than its brethren. Plaintiff Intuitive Surgical, Inc. (Intuitive) first appealed defendant's tax adjustments for 2008, 2009, and 2010 to the Michigan Tax Tribunal (MTT). Defendant sought summary disposition of Intuitive's claims because the department complied with the plain language of 2007 PA 36 and 2014 PA 282. Defendant further argued that the MTT lacked jurisdiction to resolve the constitutional challenges to 2014 PA 282. In response, Intuitive filed a declaratory judgment action in the Court of Claims to resolve the constitutional issues. The MTT held the proceedings in abeyance pending the Court of Claims' resolution. And the Court of Claims found no constitutional violation and summarily dismissed Intuitive's declaratory judgment action.

Defendant now contends that the Court of Claims lacked jurisdiction to hear the matter because (1) the action was filed beyond the 90-day window, (2) the declaratory judgment complaint did not allege an "actual controversy" as required by MCR 2.605(A), and (3) the Court of Claims' action was actually a collateral attack on certain MTT decisions, which should have been challenged through a direct appeal to this Court. Defendant did not raise these challenges below. However, "jurisdictional defects may be raised at any time, even if raised for the first time on appeal." *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 97; 693 NW2d 170 (2005). We review such jurisdictional questions de novo. *Id*. at 98.

The lack of subject matter jurisdiction is a serious defect. A court must dismiss an action without considering the merits when jurisdiction is lacking. See *Electronic Data Sys Corp v Flint Twp*, 253 Mich App 538, 544; 656 NW2d 215 (2002) ("The lack of subject-matter jurisdiction is so serious a defect in the proceedings that a tribunal is duty-bound to dismiss a plaintiff's claim even if the defendant does not request it. Indeed, having determined that it has no jurisdiction, a court should not proceed further except to dismiss the action.") (citation omitted). Accordingly, even though the Court of Claims correctly resolved the constitutional question, we must determine whether it had authority to consider the claim in the first instance.

First, we discern no error in the Court of Claims considering this action despite that it was filed more than 90 days after defendant's adverse decision. See MCL 205.22(1). This Court impliedly accepted the waiver of this time limitation in *Toll Northville, LTD v Northville Twp*, 272 Mich App 352; 726 NW2d 57 (2000), aff'd in part and vacated in part on other grounds 480 Mich 6; 743 NW2d 902 (2008), when a party seeks resolution of a constitutional issue that arises during the pendency of an MTT case.

Second, there existed an actual controversy to place before the Court of Claims for resolution. MCR 2.605 governs declaratory judgment actions. MCR 2.605(A)(1) provides, "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." MCR 2.605(A)(2) continues, "For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment."

> Generally, an actual controversy exists where a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights. *Shavers v Attorney General*, 402 Mich 554, 588-589; 267 NW2d 72 (1978); *Durant v Dep't of Ed (On Remand)*, 238 Mich App 185, 204-205; 605 NW2d 66 (1999). "What is essential to an 'actual controversy' under the declaratory judgment rule is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." *Shavers*, 402 Mich at 589; *Fieger v Comm'r of Ins*, 174 Mich App 467, 470-471, 437 NW2d 271 (1988). Generally, where the injury sought to be prevented is merely hypothetical, a case of actual controversy does not exist. *Recall Blanchard Comm v Secretary of State*, 146 Mich App 117, 121; 380 NW2d 71 (1985). [*Citizens for Common Sense in Gov't*, 243 Mich App at 55.]

In *Toll Northville*, 272 Mich App at 355, the plaintiff appealed the defendant township's decision to increase the taxable value of its property in 2000 and therefore impose a higher tax liability in 2001 and 2002 to the MTT. During that action, the constitutionality of the underlying statute came into question. As the MTT lacks statutory jurisdiction to consider such constitutional attacks, the plaintiff filed a separate declaratory judgment complaint in the circuit court to resolve the issue. *Id.*; see also See *Meadowbrook Village Assoc v Auburn Hills*, 226 Mich App 594, 596; 574 NW2d 924 (1997) ("The [MTT] does not have jurisdiction over constitutional questions and does not possess authority to hold statutes invalid."). The defendant contended in both the MTT and the circuit court action that the MTT lacked jurisdiction to impose a remedy because the plaintiff attacked the 2001 and 2002 tax assessments, but the change in taxable value occurred in 2000. *Toll Northville*, 272 Mich App at 359-360. This Court concluded that the circuit court did have jurisdiction over the constitutional claim, however, because no decision had been made regarding the MTT's jurisdiction and the parties retained an interest in adverse claims. *Id.* at 361.

So too here, Intuitive filed an MTT action regarding tax years 2008 through 2010. The MTT had yet to resolve those actions and the parties retained an interest in their adverse claims. Accordingly, an actual controversy existed which the Court of Claims could resolve to guide the definition of the parties' rights in the future in the MTT action. Moreover, just as in *Toll Northville*, the current plaintiff sought a present resolution about past tax years. Although the financial injury had already occurred, resolution of the parties' rights would affect the present and the future.

Defendant's claim that Intuitive's declaratory judgment complaint was actually a collateral attack is similarly unfounded. The MTT could not resolve the constitutional challenge and resolution of that question was necessary before the merits of Intuitive's underlying challenge to the tax assessment could be decided. Evidencing that the MTT could not resolve the matter, it held the case in abeyance pending the Court of Claims' decision. The MTT had yet to resolve the matter, so Intuitive's Court of Claims' action could not be a collateral attack.

Finally, defendant asserts that the Court of Claims should have dismissed Intuitive's declaratory judgment complaint because another action between the same parties raising the same issues remained pending in the MTT. This contention is completely inconsistent with *Toll*

Northville, however, in which the MTT also held a matter in abeyance to permit the plaintiff to seek resolution of a constitutional issue in the circuit court.

We affirm.

/s/ Elizabeth L. Gleicher
/s/ William B. Murphy
/s/ Donald S. Owens