MICHIGAN'S NEW SLEEPER TAX ON SALES OF REAL ESTATE THE "NEW" DEFINITION OF "GROSS RECEIPTS" UNDER THE SINGLE BUSINESS TAX ACT

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INTRODUCTION

Effective for tax years beginning after December 31, 2000, the Michigan Legislature enacted 2000 P.A. 477, amending the Single Business Tax Act (the "SBTA")[1] to change the definition of "gross receipts." Under P.A. 477 "gross receipts" means the "<u>entire amount received</u> by the taxpayer <u>from any activity</u> whether in intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others" with certain specified exceptions.[2]

This change in definition created a "sleeper tax" that caught routine sellers of real estate unaware. And while the Legislature passed a bill to correct this problem in late 2002,[3] this new law does not take effect until October 1, 2003. Moreoever, given Michigan's budget problems, the legislature may be tempted to delay relief from the "sleeper tax."

Under P.A. 477, the "<u>entire amount received</u>" from the sale or exchange of depreciable and non-depreciable real property (and other capital assets) is, with certain exceptions discussed below, subject to single business taxation. For those real estate taxpayers that sell improved and/or unimproved realty, this is a significant statutory change that will have a material adverse single business tax ("SBT") effect on many real estate sale transactions in Michigan.

This article explains P.A. 477 and reviews the detailed legislative history. The legislative history plainly indicates that the Legislature never intended to impose a new or increased tax on real estate sale transactions in Michigan. The article discusses the Department of Treasury's ("Department") efforts to minimize some of the adverse tax affects of the legislation. The article also includes a number of examples that compare the SBT consequences under the old and the new definitions of gross receipts. The article concludes with a discussion of strategies to minimize the adverse tax consequences associated with the new definition of gross receipts.

<u>DISCUSSION</u>

<u>The Legislature Did Not Intend to Impose a New Tax on Real Estate</u>

Senate Bill 1300 ("S.B. 1300"), which became P.A. 477, was originally introduced in the Michigan Senate on May 30, 2000. As originally introduced S.B. 1300 would have resolved a long-standing dispute between the advertising industry and the Department regarding the SBT taxation of amounts paid to advertising agencies.

According to a Senate Fiscal Agency ("SFA") Bill Analysis (dated September 22, 2000), S.B. 1300 as originally introduced, would have amended the SBTA definition of "gross receipts" to exclude from gross receipts "amounts received by an advertising agency to acquire advertising media time, space, or talent on behalf of another person." According to this SFA Bill Analysis, S.B. 1300 "would reduce single business tax revenue an estimated $6.3 million in [fiscal year] 2000-2001 . . . In subsequent years, this bill would reduce single business tax revenue about $1.0 million per year." (Emphasis added.)

Subsequently, S.B. 1300 was amended in the Senate (by Senate Substitute S-1) to address the Court of Appeals' decision in *PM One, Limited v Department of Treasury*, 240 Mich App 255 (2000). According to SFA Bill Analysis (dated October 2, 2000), in *PM One Limited* the "Court [of Appeals] held that certain amounts received by a taxpayer for certain agency-related [real estate management] responsibilities could not be included in a taxpayer's gross receipts . . . The provisions in the bill relating to amounts received while acting in an agency capacity would attempt to create greater conformity between the *PM One* decision and the [SBT] statute." According to the October 2, 2000 SFA Bill Analysis, under both *PM One* and amended S.B. 1300 (Substitute S-1), real estate management companies and other taxpayers would **reduce** their SBT liabilities: "Taxpayers [who restructure their operations] could eliminate all or a majority of their SBT liability." According to this SFA Bill Analysis, "The bill would reduce State General Fund revenues by an unknown amount. . . ." (Emphasis and material in brackets added.)

Later, S.B. 1300 was amended by the House of Representatives in Substitute Bill H-1. The House Legislative Analysis Section Report (dated November 29, 2000) discussed the "fiscal implications" of amended S.B. 1300 (Substitute H-1) in the following terms: "Both the House Fiscal Agency and Senate Fiscal Agency say the bill would reduce General Fund revenues from the SBT by an unknown amount. . . ." (Emphasis added).

From the foregoing legislative history, a clear picture emerges that the House and Senate staff reports provided to the House and Senate members informed those voting on S.B. 1300 that its enactment would reduce SBT taxes. In the final SFA Bill Analysis (dated January 31, 2001), which was prepared after the legislature had enacted P.A. 477, the SFA again declared that "The bill will reduce State General Fund revenues by an unknown amount."

For the reasons explained below, and although the legislature intended S.B. 1300 to decrease taxes, S.B. 1300, as enacted as P.A. 477, has actually increased the SBT taxes imposed on many real estate sale transactions, in some instances very significantly.

The New Definition of Gross Receipts

While not intended by the legislature, and hence a "sleeper" tax, P.A. 477 effected a substantial change from prior law in the circumstance where a taxpayer sells a capital asset, including depreciable or non-depreciable real estate, and elects under SBTA

Section 31(2)[4] to use the 50% gross receipts method (the "Short Method") to calculate the taxpayer's annual SBT liability.

Under the prior statutory definition of "gross receipts,[5]" the sale or exchange of capital assets, including land and buildings, did not result in "gross receipts" under the SBTA because "gross receipts" (with a number of exceptions for certain agency, rental and lease receipts) only arose from the sale of inventory-type property or property held primarily for sale in the ordinary course of a taxpayer's trade or business.[6] For most taxpayers, this definition of gross receipts would not include proceeds from the sale of real estate held for investment or held for similar business purposes.

Under the pre-P.A. 477 definition of "gross receipts," a taxpayer could sell real estate on the first day of a tax year, recapture the Capital Acquisition Deduction ("CAD") previously deducted,[7] elect to use the 50% gross receipts Short Method under SBTA Section 31(2) to calculate the taxpayer's adjusted SBT base, and thereby pay tax on only 50% of the CAD recaptured, if any. The P.A. 477 definition of "gross receipts," since it includes the "entire amount received" from a sale, has changed this result for the vast majority of real estate sale transactions, including the sale of land which was not previously taxed at all (unless it was inventory in the hands of the taxpayer). P.A. 477 will result in a larger SBT adjusted tax base against which the 50% gross receipts Short Method election may be made. Since the adjusted gross receipts tax base will be larger, P.A. 477 will increase the amount of single business taxes owing upon the sale of most non-inventory real estate.

Determining SBT Tax Liability

Annually taxpayers can choose the lower of two different methods to calculate their SBT tax base: the regular method under SBTA Section 9 or the 50% gross receipts Short Method under SBTA Section 31(2). The Short Method is intended to ensure that the maximum SBT tax imposed on a taxpayer will equal the single business tax rate times 50% of the taxpayer's adjusted gross receipts. While real estate taxpayers should compute their taxes under both methods in order to determine which method results in a smaller tax, for many single purpose entities (such as limited partnerships and limited liability companies) that sell real estate, until 2001 the Short Method almost always resulted in the smaller tax.

The Department's 2002 Notice Regarding the Post-2000 SBT Definition of "Gross Receipts"

Since many taxpayers, their advisors and the legislature were unaware of the significance of the application of P.A. 477 to the routine sale of real estate, taxpayers that sold real estate during 2001 did not learn of the new sleeper tax until their 2001 annual SBT returns were prepared in early 2002. Because of the controversy surrounding the double taxation of certain receipts under P.A. 477's definition of "gross receipts," in June 2002 the Department released a Notice[8] (the "2002 Notice") that, in some circumstances, mitigates against some of the adverse SBT tax consequences that result from the new definition.

While the tax results achieved under the 2002 Notice are difficult to reconcile with the language used in P.A. 477, according to the 2002 Notice, in the limited circumstance where a taxpayer sells or disposes of depreciable property that was previously subject to a CAD, the amount of the CAD recapture and gain on the sale should be removed from the "entire amount received" by the taxpayer. According to the examples used in the 2002 Notice, when depreciable assets are sold at a gain taxpayers should calculate their "adjusted gross receipts" so that the sales price (the gross receipts) received by the taxpayer is reduced by the sum of (a) the amount of any CAD recaptured ("CADR") and (b) any gain realized on the sale of the depreciable property. Any losses on the sale are added to and increase the amount of adjusted gross receipts.

Conversely, and while not discussed in the 2002 Notice, in the circumstance where a non-depreciable asset (for example, vacant land or an intangible) is sold after 2000, "gross receipts" and "adjusted gross receipts" under P.A. 477 include the "entire amount received" by the taxpayer without adjustments. While it is difficult to justify the different SBT tax treatment afforded to sales of depreciable versus non-depreciable property under the 2002 Notice, it is clear that different tax consequences will result under P.A. 477 and the 2002 Notice. These differences are highlighted in the following examples.

EXAMPLES

The following examples illustrate the application of P.A. 477's amended definition of gross receipts. Example 1 compares the SBT tax consequences that arise from the sales of depreciable property in 2000 (under prior law) and 2001 (under P.A. 477). While the SBT tax rate is actually decreasing over time at the rate of .01% per year,[9] the calculations in Example 1 use the 2% tax rate in effect for the tax year ending December 2000. All of the examples assume that the taxpayer elects to calculate its annual SBT liability in accordance with the 50% Short Method under SBTA Section 31(2).

EXAMPLE 1

Assume that the taxpayer purchased land and building on January 1, 1995 for a total cost of $5 million. $1 million of the purchase price is allocated to land and $4 million to the building. In 1995 the taxpayer claimed a CAD deduction for the $4 million cost of the building. No CAD deduction was claimed on the land, as land is a non-depreciable asset.

Assume that on January 1, 2000, the taxpayer sold the land and building for $7 million. Of this amount, $5,750,000 of the sale proceeds is allocated to the building, and $1,250,000 is allocated to the land. The accumulated depreciation deducted on the building was $611,240, so the building's adjusted basis for federal income tax purposes is

$3,388,760 ($4,000,000 – 611,240 = $3,388,760). The adjusted basis of the land is $1 million. For federal income tax purposes, the gain on the sale is calculated as follows:

	Building	Land
Amount realized	$5,750,000	$1,250,000
Less: adjusted basis	3,388,760	1,000,000
Gain	$2,361,240	$ 250,000

Application of Pre-P.A. 477 Definition of Gross Receipts

Under the pre-2001 definition of gross receipts, the SBT adjusted tax base under the Short Method is equal to the taxpayer's gross receipts plus CADR, multiplied by 50%. Since the pre-2001 definition of gross receipts includes only sales of inventory-type property and property held primarily for sale in the ordinary course of business, as well as rental or lease receipts, all of the sale proceeds are excluded from "gross receipts." Accordingly, only the CADR is included in the adjusted gross receipts tax base under SBTA Section 31(2). In Example 1 the adjusted gross receipts tax base is calculated as follows:

	Land	Building	Total
Gross Receipts	$ -	$ -	$ -
Plus CADR			
Proceeds:	$ -	$5,750,000	$5,750,000
Less: federal gain	-	2,361,240	2,361,240
Plus: federal loss	-	-	-
CADR	$ -	$3,388,760	$3,388,760
Gross receipts tax base (before 50% reduction)			$3,388,760

Application of P.A. 477 Definition of Gross Receipts

After December 31, 2000, for sales of depreciable property, the adjusted tax base for the 50% Short Method is equal to the "entire amount received" from the sale as adjusted by the 2002 Notice. According to the Department's 2002 Notice, taxpayers can reduce the "entire amount received" by the CADR, since the CADR amount was already included in "gross receipts" as part of the entire amount received, and by the gain realized on the sale transaction. Therefore, under P.A. 477 as interpreted by the 2002 Notice, the calculation of the taxpayer's adjusted tax base is as follows:

	Land	Building	Total
Gross Receipts	$1,250,000	$5,750,000	$7,000,000
No CADR Recapture (Per 2002 Notice)		$-	$-
Less: Gain (Per 2002 Notice)			($2,611,240)
Adjusted Gross receipts tax base (before 50% reduction)			$4,388,760

Applying the 2% tax rate in effect for the 2000 tax year, P.A. 477 increases the taxpayer's SBT tax liability by $10,000. The calculation is as follows:

	Pre-P.A. 477	Post-P.A. 477
Adjusted Gross Receipts tax base (before 50% reduction)	$3,388,760	$4,388,760
Less: 50% Reduction	x 50%	x 50%
Adjusted Gross receipts tax base	$1,694,380	$2,194,380
Tax rate	2%	2%
SBT Tax Liability	$ 33,888	$ 43,888

EXAMPLE 2

Assume that $1 million is paid on January 1, 1995 to purchase vacant land. Since land is non-depreciable property, the taxpayer did not claim a CAD in 1995. On January 1, 2000, the vacant land is sold for $7 million, and the taxpayer realized a $6 million gain on the sale ($7 million – 1 million = $6 million).

Under the pre-P.A. 477 definition of gross receipts, there are no (zero) "gross receipts" arising from the sale of the vacant land because (1) there is no CAD to be recaptured and (2) the land was held for investment and not primarily for sale to customers as inventory-type property. Assuming the taxpayer elects to use the SBTA Section 31(2) Short Method, no SBT taxes would be owing in 2000 in connection with the 2000 sale of the vacant land.

If the sale of the land takes place on January 1, 2001 (or thereafter), under P.A. 477 the "gross receipts" and "adjusted gross receipts" are $7 million, which is the "entire amount received" by the taxpayer. Since the sale includes only the sale of non-depreciable property (vacant land), the adjustments permitted by the 2002 Notice (in connection with the sale of depreciable property) do not apply. Assuming a 2% SBT rate in 2001,[10] the tax owing would be $70,000 ([$7 million x 50%] x 2% = $70,000). The effective SBT tax rate imposed on the sale of the non-depreciable property in Example 2 is substantially higher than the effective tax rate imposed in Example 1 on the sale of depreciable property.

EXAMPLE 3

Assume the same facts as Example 1 except that the taxpayer was unable to use the full $4 million CAD claimed in 1995. Assume that the unused CAD generated a business loss carry forward and, as of January 1, 2001, the amount of the business loss carry forward was $1 million.[11] The taxpayer sells the land and building on January 1, 2001 for $7 million as indicated in Example 1.

As under prior law, P.A. 477 does not allow the taxpayer to reduce the gross receipts by the amount of the $1 million unused SBT business loss carry forward.[12] Therefore, under P.A. 477 and the 2002 Notice, the taxpayer's adjusted gross receipts (before application of the 50% reduction) are $4,388,760 (same as Example 1).

CONCLUSION

For tax years commencing on or after October 1, 2003, the Legislature, by enacting P.A. 606, appears to have eliminated the sleeper tax on real estate. However, P.A. 606 does not apply to tax years that begin prior to October 1, 2003. For these tax years, the Department's issuance of the 2002 Notice ameliorates some of the adverse tax effects of P.A. 477 when depreciable realty is sold. Taxpayers that sold depreciable property in 2001 should consider filing claims for refund (amended SBT returns) based on the 2002 Notice.

Unfortunately, since the Department's Notice does not apply to the sale of non-depreciable property, P.A. 477 will be especially troublesome for taxpayers that sell non-depreciable property. For sellers of non-depreciable property, such as vacant land, these taxpayers should consider constructing buildings (e.g. a build to suit) on their vacant land before they sell the property so that, at the time the property is sold, it should be subject to recapture of the SBT investment tax credit ("ITC") under SBTA Section 35a. By obtaining an ITC on the improvements to the real estate, it is at least arguable that the adjustments allowed in the Department's 2002 Notice should apply in calculating the taxpayer's gross receipts and adjusted gross receipts under P.A. 477 when the (now) depreciable property is sold.

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NOTICE FOR SBT FILERS
Adjusted Gross Receipts; Capital Acquisition Deduction Recapture and Investment Tax Credit Recapture

General Summary

Pursuant to 2000 PA 477, "gross receipts" as defined in the Single Business Tax Act ("SBTA") includes the entire proceeds from the sale of a depreciable, tangible asset. However, the taxpayer is not required to report the proceeds from the asset sale twice when calculating "adjusted gross receipts" as described in this notice.

Adjusted Gross Receipts

For tax years that begin on or after January 1, 2001, this notice explains the calculation of "adjusted gross receipts" and "gross receipts plus" capital acquisition recapture ("CADR") for the following purposes only:

1) Gross Receipts Reduction [MCL 208.31(2)]

2) Investment Tax Credit Percentage [MCL 208.35a(10)]

3) Filing Threshold [MCL 208.73]

This notice does not change the calculation of CADR that is added to the tax base under MCL 208.23a.

Please note that assets eligible for the investment tax credit ("ITC") are not included in the adjusted gross receipts calculation for gross receipts reduction and filing threshold purposes, but are included for purposes of calculating the ITC rate. For gross receipts reduction and filing threshold purposes, only capital acquisition deduction ("CAD") assets are included in the calculation. For gross receipts reduction purposes [MCL 208.31(2)] include only the adjustments provided for under Sec. 23b(a) to (g). For filing threshold purposes [MCL 208.73] include only adjustments under Sec. 23b(a),(b) and (c). For ITC percentage purposes [MCL 208.35a(10)] include the adjustments under sections 23b(a) to (g) and 35a(1)(d) to (f).

Explanation and Examples

For tax years that begin on or after January 1, 2001, gross receipts as defined by MCL 208.7(3) includes, among other items, the gross proceeds from the sale of property used in the taxpayer's business activity. When calculating "adjusted gross receipts" for the purposes of the sections cited in paragraphs 1), 2), and 3) above, the taxpayer is required to add certain amounts to gross receipts. The phrase "gross receipts plus adjustments" appears in MCL 208.31(2):

> "As used in this section, "adjusted tax base" means the tax base allocated or apportioned to this state pursuant to chapter 3 with the adjustments prescribed by sections 23 and 23b and the exemptions prescribed by section 35. If the adjusted tax base exceeds 50% of *the sum of gross receipts plus the adjustments provided in section 23b(a) to (g)*, apportioned or allocated to Michigan with the apportionment fraction calculated pursuant to chapter 3, the adjusted tax base may, at the option of the taxpayer, be reduced by that excess…." MCL 208.31(2).

"Gross receipts" as used in the above section already includes the gross proceeds from the sale of tangible assets that are subject to capital acquisition deduction recapture. Therefore, to avoid double reporting of these receipts, for purposes of the above-cited sections only, when calculating the adjustments under section 23b(a) to (g), the taxpayer shall subtract the gain from gross receipts or add the loss to gross receipts, as illustrated in the following example.

> **Example**: The taxpayer's gross receipts for the tax year are $90. This includes "sales" of inventory of $75 and gross proceeds from the sale of an asset subject to CADR of $15. The sale of the asset resulted in a loss of $5 for federal income tax purposes. For purposes of calculating gross receipts plus adjustments under section 31(2), the taxpayer starts with gross receipts of $90, then adds the loss of $5, for a total adjusted gross receipts of $95.

The same reasoning described above applies when calculating "gross receipts plus the adjustments" provided in sections 23b(a), (b), and (c), for filing threshold purposes under MCL 208.73.

The calculation of "adjusted gross receipts" for purposes of determining the percentage rate for the Investment Tax Credit (ITC) also follows the same reasoning as above. Section 35a(10) describes the "adjusted gross receipts" calculation as follows:

> MCL 208.35a(10) As used in subsection (2), "adjusted gross receipts" means the sum of the following:
>
> (a) *Gross receipts* apportioned or allocated to Michigan with the apportionment fraction calculated pursuant to chapter 3.
> (b) Adjustments provided in section 23b(a) to (g).
> (c) Adjustments provided in subsection (1)(d) to (f).

"Gross receipts" as that term is used in section 35a(10)(a) [in italics above] already includes the gross proceeds from the sale of tangible assets that are subject to recapture related to the investment tax credit or the capital acquisition deduction. Therefore, the taxpayer shall not include the gross proceeds from the sale of such depreciable, tangible assets again when calculating the adjustments provided in sections 23b(a) to (g) and 35a(1)(d) to (f). The following example demonstrates the adjustments for CAD or ITC recapture as provided by sections 23b(a) to (g) and 35b(1)(d) (f) (assume the asset was subject to CAD recapture):

> **Example**: The taxpayer's gross receipts for the tax year are $100. This $100 in total gross receipts includes the gross proceeds from the sale of a depreciable capital asset used in the taxpayer's business activity equaling $25. The gain for federal income tax purposes on the sale of the asset is $5. Subtract the gain from gross receipts [$100 Gross Receipts – $5 gain on sale of asset = $95 Adjusted Gross Receipts].

For simplicity, the above examples involve taxpayers not subject to apportionment. However, taxpayers that are subject to apportionment must make similar adjustments in order to avoid accounting for the same proceeds more than once in the calculation of adjusted gross receipts.

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[1] 2000 P.A. 477, amending SBTA Section 7(1) and 7(3) (filed with the Secretary of State on January 10, 2001).

[2] In addition to adding the "entire amount received" language to SBTA Section 7(3), P.A. 477 also amended Section 7(3) to generally track the "agency exceptions" discussed in *PM One, Limited v Department of Treasury*, 240 Mich App 255 (2000). Under PA 477 "gross receipts" do not include: (1) proceeds from sales by a principal that the taxpayer collected in an agency capacity solely on behalf of the principal and delivered to the principal; (2) amounts that were excluded from gross income of a foreign corporation engaged in the international operation of aircraft under §833(a) of the Internal Revenue Code; (3) amounts received by an advertising agency used to acquire advertising media time, space, production, or talent on behalf of another; (4) amounts received by a taxpayer that manages real property owned by the taxpayer's client that are not reimbursements to the taxpayer and are not indirect payments for management services that the taxpayer provides to that client; and (5) amounts received by the taxpayer as an agent solely on behalf of the principal that were expended by the taxpayer for any of the following six purposes: (a) the performance of a service by a third party for the principal's benefit that was required by law to be performed by a licensed person; (b) the performance of a service by a third party for the principal's benefit that the taxpayer had not undertaken a contractual duty to perform; (c) the principal and interest under a mortgage loan or land contract, lease or rental payments, or taxes, utilities, or insurance premiums relating to real or personal property owned or leased by the principal; (d) a capital asset of a type that is or, under the IRC, will become eligible for depreciation, amortization, or accelerated cost recovery by the principal for federal income tax purposes, or for real property owned or leased by the principal; (e) property not described in (d) purchased by the taxpayer on behalf of the principal and that the

taxpayer did not take title to or use in the course of performing its contractual business activities; and (f) fees, taxes, assessments, levies, fines, penalties, or other payments established by law that were paid to a governmental entity and that were the legal obligation of the principal.

[3] On December 20, 2002, the Michigan Legislature enacted 2002 Public Law 606, which amended the SBT Act definition of "gross receipts" for tax years that begin on or after October 1, 2003. P.A. 606 amended the definition of "gross receipts" to exclude sale of depreciable and nondepreciable real estate. For sales governed by P.A. 606, the rules discussed in endnote 6, should apply

[4] MCL 208.31(2). Under SBTA Section 31(2), taxpayers can elect to calculate their annual SBT liability using the Short Method, in lieu of using the standard addition/subtraction method to calculate their SBT tax base under SBTA Section 9. Under the Short Method, taxpayers calculate their "adjusted tax base" by first determining their total "gross receipts." Total gross receipts are then apportioned among the states if the taxpayer is taxable in Michigan and in other states. Recaptured capital acquisition deduction is then added to the taxpayer's apportioned gross receipts. To the extent that the "adjusted tax base" exceeds 50% of the "gross receipts," the taxpayer can reduce its gross receipts by the amount of the excess. In effect, the SBT tax rate is applied against 50% of the taxpayer's gross receipts.

[5] MCL 208.7(3)(2000) defined "gross receipts" as follows:

(3) Gross receipts means the sum of sales, as defined in subsection (1), and rental or lease receipts. Gross receipts does not include the amounts received in an agency or other representative capacity, solely on behalf of another or others but not including amounts received by persons having the power or authority to expend or otherwise appropriate such amounts in payment for or in consideration of sales or services made or rendered by themselves or by others acting under their direction and control or by such fiduciaries as guardians, executors, administrators, receivers, conservators, or trustees other than trustees of taxes received or collected from others under direction of the laws of the federal government or of any state or local governments. (Emphasis added.)

"Sale" or "sales" were defined by prior MCL 208.7(1) (2000) as follows:

(1) Sale or sales means the gross receipts arising from a transaction or transactions in which gross receipts constitute consideration: (a) for the transfer of title to, or possession of, property that is stock in trade or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business, or (b) for the performance of services, which constitute business activities other than those included in (a), or from any combination of (a) or (b). (Emphasis added.)

[6] See, Department's SBT Questions & Answers ("Q & A"), E14 ("Is the sale of a capital asset included in gross receipts for a gross receipts taxpayer and in the sales factor for a multi-state taxpayer? [Answer] The sale of a capital asset is not included in with the gross receipts or the sales factor") and Q & A E18 ("Capital gains and losses under the

IRC generally apply to dispositions of capital assets. The definition of capital assets . . . [excludes] property primarily held for resale to customers or . . . inventory of the taxpayer. . . . [C]an it be concluded that receipts from any disposition of property receiving capital gain or loss treatment are not gross receipts? [Answer]. Yes. As a general rule, receipts from the disposition of property (capital assets) receiving capital gain or loss treatment are not included as gross receipts. For certain calculations, the SBTA does require the combination of the recapture of capital acquisition deduction with gross receipts.") (Emphasis added.)

[7] MCL 208.23, *et seq*.

[8] The Department's 2002 Notice is attached to this article Exhibit 1. In its 2002 Notice the Department states that "gross proceeds . . . includes the entire proceeds for the sale of a **depreciable**, tangible asset. However, the taxpayer is not required to report the proceeds from the asset sale twice when calculating "adjusted gross receipts" . . .' gross receipts' as used in the above section already includes the gross proceeds from the sale of tangible assets that are subject to capital acquisition deduction recapture. Therefore, to avoid double reporting of these receipts, . . . the taxpayer shall subtract the gain from gross receipts or add the loss to gross receipts. . . ." (Emphasis added.) It is the authors' understanding that the Department's position is that the 2002 Notice does not apply to the sale of non-depreciable assets, such as land.

[9] See 1999 P.A. 115.

[10] Under 1999 P.A. 115, the actual 2001 SBT rate is 1.9%.

[11] See SBTA Section 23b(h). Business loss carry forwards may be carried forward for nine years.

[12] See Department's Q & A Number J4 ("In using the gross receipts method of computing the tax, can a taxpayer reduce the gross receipts by a business loss, a Michigan NOL carry forward, and the statutory exemption? [Answer] No. However these items are used in computing the adjusted tax base, which is necessary to determine whether or not the gross receipts method should be used." (Emphasis added.)

In Example 3 the taxpayer can claim the $1 million business loss carry forward if the taxpayer uses the standard SBTA Section 9 method to calculate the taxpayer's SBT base.