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**Allocation/Apportionment**

Michigan's retroactive repeal of the Multistate Tax Compact after the *IBM* decision has been garnering a lot of attention. In this article, authors Patrick Van Tiflin and Daniel Stanley discuss the impact of that decision and the status of the Compact in Michigan.

**Update on Multistate Tax Compact Election Litigation in Michigan**

BY PATRICK R. VAN TIFLIN AND DANIEL L. STANLEY

**M**ichigan has recently been a hotbed of activity regarding the Multistate Tax Compact (the “Compact”). In July 2014, the Michigan Supreme Court issued its decision in *Int'l Bus. Machs. Corp. v. Mich., Dep't of Treasury*, 496 Mich. 642; 852 N.W.2d 865 (2014), holding that taxpayers were entitled to elect to apportion using the Compact's provisions for tax year 2008.

The court also held that both the business income tax and the modified gross receipts tax of the Michigan Business Tax (MBT) were “income taxes” within the

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meaning of the Compact. The *IBM* decision was not the end of the matter—not by a long shot.

The Michigan Legislature quickly reacted to the *IBM* decision by taking pending Senate Bill 156 (“S.B. 156”), which had been introduced on Feb. 6, 2013, and using it as a vehicle for retroactively repealing the Compact. As introduced, S.B. 156 sought to amend the MBT to:

- adjust the gross receipts tax base for income attributable to cancellation of debt;
- revise a credit for recapture of revenue when property is sold;
- revise the calculation of the renaissance zone credit; and
- revise a sourcing provision concerning dock sales.

The Senate had passed S.B. 156 on May 14, 2014. S.B. 156 was then sent to the House, where it lay dormant for more than 115 days. Following the Supreme Court's decision in *IBM*, the House quickly took up S.B. 156.

On Sept. 9, 2014, the House amended S.B. 156 by tacking on an “enacting section” that retroactively repealed the Compact as of Jan. 1, 2008, quickly passed the amended S.B. 156, and sent the amended bill to the Senate. On Sept. 10, 2014, the Senate passed S.B. 156.

As part of this process, S.B. 156's original sponsor, Sen. Brandenburg, asked to be removed as the sponsor of the bill. On Sept. 11, 2014, S.B. 156 was signed by the Governor, whereupon the bill became 2014 MICH. PUB. ACTS 282 ("PA 282").

Taxpayers have asserted numerous arguments that PA 282 is invalid, including that it violates:

- Article X of the Compact itself;
- taxpayers' rights to due process;
- the Commerce Clause of the U.S. Constitution;
- the Contracts Clause of the U.S. Constitution;
- the separation of powers clause of the Michigan Constitution;
- the title-object clause of the Michigan Constitution;
- the 5-Day Layover Rule of the Michigan Constitution; and
- the Change-of-Purpose Clause of the Michigan Constitution.

Two Compact cases were pending at the Court of Appeals when PA 282 was passed: *Lorillard Tobacco Co. v Michigan Dept. of Treas.*, Court of Appeals Docket No. 313256 and *Anheuser-Busch, Inc. v. Dep't of Treasury*, Michigan Court of Appeals Docket Nos. 316743 and 316977. Oral argument was held before the Court in *Lorillard* on Sept. 4, 2014 (i.e., 7 days before PA 282 took effect) and on Sept. 16, 2014, the Court of Appeals issued a decision in favor of the taxpayer based on the Michigan Supreme Court's decision in *IBM*. The Michigan Department of Treasury filed a Motion for Reconsideration based on PA 282, which was denied on Nov. 14, 2014. Treasury has filed an Application for Leave Appeal with the Michigan Supreme Court in *Lorillard*, which is still pending.

Oral argument was held before the Michigan Court of Appeals in *Anheuser* on September 9, 2014 (i.e., two days before PA 282 took effect). Subsequently, the Court of Appeals ordered the parties to brief the impact of PA 282 on the case. The parties submitted briefs on the impact of PA 282 but, inexplicably, on January 27, 2015, the Court of Appeals issued an Order remanding the *Anheuser* case back to the Court of Claims.

After PA 282 was passed, the Michigan Court of Claims ordered parties to Compact cases to brief the issue of the impact of PA 282. On Dec. 19, 2014, the Court of Claims issued decisions in, *inter alia*, *Ingram Micro Inc. v. Michigan Dept. of Treas.*, Court of Claims No. 11-33-MT, and *Yaskawa Amer, Inc v Dep't of Treasury*, Court of Claims No. 11-77-MT.

The Court of Claims dismissed both cases, holding that PA 282 was valid and required dismissal of the taxpayers' Compact claims. Based upon its Opinions in *Ingram Micro* and *Yaskawa*, the Court of Claims issued Orders in 66 other Compact cases, ruling that PA 282 was valid and required dismissal of taxpayers' Compact claims. Since issuing its initial onslaught of Orders on Dec. 19, 2014, the Court of Claims has been issuing *sua sponte* orders dismissing all Compact election cases brought before it.

Over 50 cases are now pending before the Michigan Court of Appeals regarding the validity of PA 282. On Feb. 6, 2015, the Court of Appeals issued a *sua sponte* order consolidating 45 of the pending Compact cases.

The Michigan Supreme Court's decision in *IBM* was certainly not the end of litigation over the validity of the Compact in Michigan. Litigation over the Compact will likely continue for some time until it is finally resolved.