Rehearing #604
SC 146440(130)
#1/Jan 2014
(DFV)(BKZ)(BMM)

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Ronayne Krause, P.J., and Borrello and Riordan, JJ

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Defendant-Appellee.
/

Supreme Court No. 146440

Court of Appeals No. 306618

Court of Claims No. 11-33-MT

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

MOTION FOR REHEARING OF APPELLEE DEPARTMENT OF TREASURY OF THE STATE OF MICHIGAN

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Defendant-Appellee, Michigan Department of Treasury, through its counsel Attorney General Bill Schuette, Solicitor General Aaron Lindstrom, and Assistant Attorney General, Michael R. Bell, states the following in support of this motion:

INTRODUCTION

The lead opinion of the Court rejected an argument that the Business Tax Act impliedly repealed the Compact's election provision because there was no express legislative statement or action to that effect. Instead, the lead opinion concluded based on a broad historical view of Michigan taxes that the 1970 Michigan Legislature impliedly intended to overlay the Compact upon every future taxing statute that would be enacted by any subsequent sitting Legislature. There is no legislative support for this supposition. And further, the plurality opined that the 2008 Legislature impliedly intended to continue that overlay even though there *is* express legislative action and language to the exact opposite effect. This is the lead opinion's overarching error.

The core basis for deciding this case is the principle rule of statutory construction, to discern legislative intent by first considering the express and unambiguous legislative language and applying it as written. All other rules are subservient to that principle rule. *Johnson v Pastoriza*, 491 Mich 417, 446; 818 NW2d 279 (2012), citing *Frank W Lynch & Co, v Flex Technologies Inc,* 463 Mich 578, 583; 624 NW2d 180 (2001)

The Compact and the Business Tax Act are irreconcilable in *two* distinct ways: (1) each provides a method of determining which law should govern the tax

formula; and (2) each provides a formula for determining the tax. The first provision is like an order of operation, informing the taxpayer how to determine the legislative provisions that govern the tax. No plausible construction enables a resolution of the conflict in favor of the Compact election language. In 1970, the Legislature enacted the Compact and permitted that out-of-state taxpayers "may elect" the Compact's formula for determining tax liability. In 2008, the Legislature enacted the Business Tax Act to expressly limit taxpayers to applying the Business Tax Act's formula to the tax bases calculated, "*except as otherwise provided in the Act.*"[1]

The fundamental error of the lead opinion is to compare the Compact's election provision to the BTA's mandatory apportionment language. That is not the relevant comparison. Rather, it is the BTA's own election provision –"except as otherwise provided in this Act" – that makes plain that the BTA allows for another option and it does not include the Compact. By this express and unambiguous language, the Legislature precluded persons from electing the Compact's formula.

The Court's ruling that there is no implied repeal of the Multistate Tax Compact election results in the State potentially owing a budget-busting aggregated tax refund in the hundreds of millions of dollars (not including interest) to mostly out-of-state corporations. The total cost to the State is likely to exceed $1 billion.[2]

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[1] The label for this statutory alteration is irrelevant, whether named a repeal, amendment, limitation, or preclusion.

[2] Affidavit of Glenn White, Deputy Treasurer, attached to the Department's Motion for Stay filed simultaneously with this Motion for Rehearing.

STANDARD REGARDING A MOTION FOR REHEARING

This is a rare case, palpable error or not, in which the Court should exercise its discretion to grant rehearing. MCR 7.313, MCR 2.119(F)(3).

ARGUMENT

I. The Legislature precluded every taxpayer's opportunity to elect the Compact's apportionment formula under the BTA.

Section 301 makes the Compact election unavailable to taxpayers who are subject to the Business Tax Act.

In the Compact the Legislature provided that a taxpayer "may elect" to apportion income provided by the laws of the Compact or by the laws of Michigan. MCL 205.581, Article III(1). As worded, the Compact does not give an absolute right to elect the Compact's formula. The Legislature wrote that they "may" do so. Black's Law Dictionary, Abridged 5th Edition, defines "may" as an auxiliary verb that qualifies the meaning of another verb by expressing permission or possibility.

No one has a vested right in a tax statute or in the continuation of a tax law. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich at 324 (quoting *Detroit v Walker*, 445 Mich 682, 703; 520 NW2d 135 (1994); citing *Ludka v Dep't of Treasury*, 155 Mich App 250, 260; 399 NW2d 490 (1986); and *United States v Carlton*, 517 US 26, 33; 114 S Ct 2018; 129 L Ed 2d 22 (1994)). Thus, the possibility of electing the Compact's formula can be taken away completely or merely limited.

In the Business Tax Act, the Legislature provided that each tax base established under this Act "shall be" apportioned in accord with Chapter 3 of this Act. MCL 208.1301(1). And further, each tax base of a person subject to tax within and outside this State "shall be" apportioned by applying the sales factor calculated under §303 (MCL 208.1303). Conclusively, the Legislature also directed that the single sales factor shall be applied, "except as otherwise provided in the act." MCL 208.1301(1). This is the key phrase of the Business Tax Act. The phrase informs taxpayers regarding the applicable apportionment formula and opportunity to apply an alternative. That phrase performs the same function as the election provision in the Compact, i.e., providing guidance to the taxpayer about what formulas are available for calculating the tax. That is the lead opinion's chief error, comparing the Compact's election provision to the BTA's "mandatory apportionment language." See slip op, pp 12-13. And then deciding that the 2008 Legislature impliedly intended the Compact election provision to override the entirety of §301. Based on the statutory language, the Court may not reasonably give the Compact election provision priority over §301.

The phrase "except as otherwise provided in the act" was not contained in either the Income Tax Act of 1967 or the Single Business Tax Act, which merely directed that the taxpayer "shall" use the apportionment formula provided in those acts. This phrase forecloses the Compact election.

This conclusion is consistent with the way this Court has interpreted the phrase "except as otherwise provided" in other statutes. In *Vega v Lakeland*

Hospitals, 479 Mich 243, 250-251; 736 NW2d 561 (2007), the Court considered in MCL 600.5851(1) the meaning of "except as otherwise provided in [600.5851(7)]." The Court determined that the phrase means that subsection (1) stated the primary applicable rule unless it was inconsistent with subsection (7), in which case subsection (7) controlled. *Id.* See also *People v Peltola*, 489 Mich 174, 182, n 2; 803 NW2d 140 (2011) in which the Court cited *Vega* for the same interpretation of the phrase.

The importance of the Court's prior construction, here, is plain. For the Court's ruling in this case to make sense based on the express and plain language of §301, the section would have needed to state "except as otherwise provided *by law...*". Under such phrasing, taxpayers would be informed of all possible options regarding the appropriate apportionment formula. Only then would the Compact's election provision control over the conflicting express mandate, in §301, that limited taxpayers to applying the single sales factor formula.

But the Legislature did not write §301 to read that way. Instead, §301 as the primary rule requires taxpayers to apply the single sales formula unless it conflicts with another provision within the Act that dictates otherwise. There are situations stated in the Business Tax Act that would control over the mandate in §301. For example, financial institutions and insurance companies are required to calculate their respective tax components in a specific manner and they do not apportion their tax bases using a single sales factor formula. MCL 208.1267(1) and MCL 208.1235(2), respectively. But there is no provision in the Business Tax Act that

allows taxpayers a unilateral right to look to another law for the possibility to elect to apply a formula from such wholly different law.

The Legislature's choice of language in §301 cannot be assumed to be inadvertent. *Bush v Shabahang*, 484 Mich 156, 169; 772 NW2d 272 (2009). As this Court wrote, "the Legislature in enacting the BTA, had full knowledge of the Compact and its provisions." Slip Op, p 14 n 51, citing *In re Reynolds Estate*, 274 Mich 354, 362; 264 NW2d 399 (1936). Since that is true, the Legislature's choice of words in §301 can only mean one thing—it expressly and plainly intended to preclude taxpayers from looking to the Compact election for an alternative formula. If it had intended to incorporate the Compact election into the Business Tax Act, it would have done so.

And this is particularly true when one considers the legislative process of House Bills 4361, 4362, and 4479—2011 PA 38, 39, and 40, respectively. Bill 4361 amended the Income Tax Act of 1967 to, among many other things, inform taxpayers of the applicable apportionment formula for both C corporations and all other persons subject to that Act. As amended, MCL 206.115, non-C corporation taxpayers were informed that before January 1, 2012, they were to apply a three factor formula the numerator of which was the property factor plus the payroll factor plus the sales factor and the denominator of which was 3. But after December 31, 2011, all such taxpayers were to apply the single sales formula stated in MCL 206.121(2). MCL 206.115. In addition, HB 4361 added MCL 206.663(3) which specifically related to C corporations and it provided:

> (3) It is the intent of the legislature that the tax base of a taxpayer is apportioned to this state by multiplying the tax base by the sales factor multiplied by 100% and that apportionment shall not be based on property, payroll, or any other factor notwithstanding section 1 of 1969 PA 343, MCL 205.581.

HB 4362, which only became effective if HB 4361 was enacted, essentially repealed the Michigan Business Tax Act but for allowing taxpayers the option of continuing to be subject to that Act until the expiration of any available credits.

HB 4479 amended the Compact in only one respect. It added the language that informed all taxpayers that, beginning January 1, 2011, such taxpayers who are subject to the either the Business Tax Act or the Income Tax Act of 1967, that they must apply the apportionment formula contained in either of those two statutes.

These 3 house bills were signed on May 25, 2011.

This historical overview of the legislative process of these bills is strongly indicative of two points. First, the 2011 Legislature did not expressly state in either HB 4362 or 4479 that §301 was to be overridden by the Compact election for years before January 1, 2011. This was the perfect opportunity to state that result if that was the legislative intent. Second, 2011 PA 40 did not create a new law that imprinted itself upon the Business Tax Act. The only important but singular addition was the informative language regarding which formula to apply after January 1, 2011.

When the lead opinion relies on 2011 PA 40 for the proposition that "by only repealing the Compact's election provision starting January 1, 2011, the Legislature created a window in which it did not expressly preclude use of the Compact's

election provision for BTA taxpayers," this is the equivalent of stating that 2011 PA 40 impliedly repealed §301. There is nothing within MCL 205.581, Article III(1) which proves that the 2011 Legislature made its intention clear to repeal both the directive to only look within the Business Tax Act for determining which apportionment formula to apply and mandating that they apply the single sales factor formula in §301. Similarly, there is nothing in PA 40 that indicates the Legislature intended the Compact election to occupy the entire field regarding informing taxpayers of their options for applying an apportionment formula.

In responding to the dissent, the Court wrote "the question is not whether the 2008 Legislature could disregard a policy choice by the 1970 Legislature—obviously it could—but instead what action it must take to make its intentions clear in the absence of express repealing language in the statute." Slip Op, p 18 n 64. The Court's question is answered by the express and plain language of §301: Except as otherwise provided in the Business Tax Act, each tax base established under the Act shall be apportioned by applying the single sales factor formula. MCL 208.1301(1) and (2).

II. The 1970 Legislature intended to bring the State within the Compact.

A. The Compact apportionment formula.

The Compact as enacted in 1970 permitted "[a]ny taxpayer subject to an income tax whose income is subject to apportionment to" "elect to apportion...his income in the manner provided by the laws of the state" "or may elect to apportion...in accordance with article IV." MCL 205.581, Article III(1).

After the election was chosen, Article IV(9) required apportioning business income "to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3." MCL 205.581, Article IV(9).

Each factor compares the in-state portion of property, payroll and sales (numerator) to the entirety of property, payroll, and sales everywhere (denominator). MCL 205.581, Article IV(10), (13), and (15).

B. The Income Tax Act of 1967, 1967 PA 281, apportionment formula as originally enacted.

When originally enacted, and at the time the Compact was enacted, the Income Tax Act provided that "[a]ny taxpayer having income which is taxable both within and without this state shall...apportion his net income as provided in this act." MCL 206.103.

"All business income...shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3." MCL 206.115.

Each factor compared the in-state portion of property, payroll, and sales (numerator) to the entirety of property, payroll, and sales everywhere (denominator). MCL 206.116, 206.119, and 206.121.

C. What to make of the two originally enacted identical apportionment formulas.[3]

A Compact choice between alternatives that presents only the Income Tax Act's formula, is no choice at all. From that perspective, the 1970 Legislature could not have intended the Compact apportionment formula election to overlay the Income Tax Act and every future tax statute.[4]

Yet, certainly the 1970 Legislature purposefully enacted the election provision in the Compact that offered taxpayers the same apportionment formula that already existed in the Income Tax Act of 1967. One policy rationale for doing this was to belong to the Multistate Tax Commission and the broader organization. By enacting the Compact, the Legislature gained admittance as a member to the Multistate Tax Commission with whatever benefit may accrue, and at the same time, in respect of the applicable apportionment formula gave up nothing that it had not already provided to taxpayers subject to the Income Tax Act of 1967.

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[3] To underscore the exactness of the two formulas, compare the additional identical language used in the original acts: compare Article IV(10) and (11) that refined the calculation of the property factor to MCL 206.117 and 206.118; compare Article IV (14) to MCL 206.120 that refined the calculation of compensation for purposes of the payroll factor; and compare Article IV(16) and (17) to MCL 206.122 and 206.123, that refined the sales factor calculation.

[4] And without doubt, the Compact cannot be viewed as an overlay on the Single Business Tax Act, 1975 PA 228, which existed from 1975 until December 31, 2007. That Act imposed a value-added tax not an income tax. *Trinova v Dep't of Treasury*, 498 US 358; 111 S Ct 818; 112 L Ed2d 884 (1991). Moreover, this Act's apportionment formula also had the same three-factor formula found in the Compact. MCL 208.45, 208.46, 208.49, and 208.51. Thus, the Compact election was irrelevant during this time-frame.

The fact that every Legislature has allowed the Compact to remain law does not establish the Compact as an overlay on other business tax statutes. Indeed, the perspective stated above proves as much. But significantly, the Compact does not contain any express statement that it will be a general overlay on any subsequent taxing statute. And more significantly, the Compact fails to expressly provide that the Compact election trumps any future new tax act, enacted by a subsequent sitting legislature, and that requires applying a specific, different formula. Of ultimate significance, the history of Michigan business taxing statutes discloses that no Michigan Legislature ever meant to give taxpayers a meaningful choice to elect the Compact formula. There is nothing sinister in that statement. As noted above, the Compact formula copied the then existing formula in the Income Tax Act of 1967. Then, in 1975 the Single Business Tax Act was enacted. This tax act was not an income tax based imposition. *Trinova, supra*, n 4. Further, it too contained the same three factor formula, although over time the weighting of the factors was changed to move finally toward a double weighted sales factor. Next came the Michigan Business Tax Act and its four tax bases and different formula applicable to the business income tax component and modified gross receipts component. Then, the 2011 amendment of the Income Tax Act of 1967 which gave non-C corporation persons a three factor formula, similar to the Compact's, for years before January 1, 2012, and took it away after December 31, 2011. MCL 206.115. But in respect of C corporations, they were outright forbidden from looking to Compact for its formula. MCL 206.663(3). Last, the amendment to the Compact

election precluding the election to any taxpayer subject to the Business Tax Act or the Income Tax Act, as amended. All this history should dispel any notion that the Legislature intended taxpayers have a meaningful choice to pick the Compact's formula over the then existing business taxing statute.

Thus, if the Court wants to draw on the broad historical overview of Michigan business taxation, that history should actually lead the Court away from the conclusion contained in the lead opinion. All that can be garnered by subsequent legislative inactivity towards the Compact, itself, is that past and current legislatures want the Compact to remain valid law within Michigan. That observation does not justify concluding that every subsequent legislature, and specifically the 2008 Legislature, meant for the Compact to be an overlay on the Business Tax Act. And that is true with respect to that Legislature's express language in §301 of the Business Tax Act, whereby it rejected applying any formula other than the single sales factor formula "except as provided in the act." MCL 208.301(1).

Rather, the result of applying §301 as expressly and unambiguously written is to deny taxpayers the opportunity of availing themselves of the Compact's election. To be sure, the 2011 amendment to the Compact makes this emphatically express and plain. But the language of §301 before the amendment already did that in express and plain terms.

CONCLUSION AND REQUEST FOR RELIEF

The Department respectfully requests that this Court reconsider its opinion to reflect that the express and plain language of §301 in the Business Tax Act limits taxpayers to applying the single sales factor formula as set forth in that Act. Further, that the mandate to use the single sales factor formula does not conflict with any other provision of the Act and so does not trigger the "except as otherwise provided in this act" phrase in §301. By doing so, the Legislature took away any possibility it may have granted to taxpayers to look to the Compact by restricting the application of any other formula solely as provided in the Business Tax Act.

As a result the Department respectfully requests that the Court affirm the Court of Claims grant of summary disposition in favor of the Department.

Respectfully submitted,

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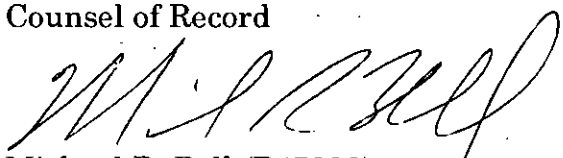

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