

## Michigan Supreme Court Denies Treasury's Motions for Rehearing / Stay in *IBM*

November 18, 2014

### Overview

On July 14, 2014, the Michigan Supreme Court in *International Business Machines v. Michigan Department of Treasury* (“*IBM*”) held that the taxpayer could elect to compute both the Modified Gross Receipts Tax (“MGRT”) and Business Income Tax (“BIT”) components of its 2008 Michigan Business Tax (“MBT”) liability using the Multistate Tax Compact (“Compact”) election in lieu of the 100% sales-weighted apportionment formula under the MBT Act.<sup>1</sup> By application of the election (Compact Article III), the taxpayer was allowed to use an equally-weighted, three-factor apportionment formula (property, payroll and sales).<sup>2</sup>

On August 4, 2014, in response to the *IBM* decision, the Michigan Department of Treasury (“Treasury”) filed two motions with the court: a Motion for Rehearing, requesting that the court reconsider its decision; and a Motion to Stay, asking that the court suspend the effects of the case pending the outcome of the Motion for Rehearing.

On November 14, 2014, the Michigan Supreme Court denied both motions.<sup>3</sup> Accordingly, the Michigan Supreme Court decision of July 14, 2014 stands, and the matter is remanded to the Michigan Court of Claims for entry of an order granting summary disposition in favor of *IBM*.<sup>4</sup>

In this Tax Alert we summarize the status of the Compact election for MBT purposes and provide some taxpayer considerations in light of the developments in *IBM* and the recent enactment of Public Act 282 of 2014, retroactively repealing the Compact provisions of Michigan law.

### Status of the Compact election

On September 11, 2014, while Treasury's motions in *IBM* were pending, Michigan Governor Snyder signed Public Act 282 of 2014 (“PA 282”), repealing “retroactively and effective beginning January 1, 2008” MCL §§ 205.581 to 205.589, the Multistate Tax Compact (“Compact”) provisions of Michigan law.<sup>5</sup> In a statement of supplemental authority filed in the *IBM* matter on September 18, 2014, Treasury brought this legislative enactment to the attention of the Michigan Supreme Court and asked that the court apply the new statute and reverse its judgment in *IBM*. On November 14, 2014, in its two-sentence order denying Treasury's motions, the Michigan Supreme Court made no reference to PA 282 or its potential application.<sup>6</sup>

While the existence of the Compact election appears to be favorably resolved for *IBM* relative to its 2008 MBT tax year (subject to Treasury seeking leave to appeal to the U.S. Supreme Court<sup>7</sup>), the broader application of the *IBM* decision to other Michigan taxpayers is difficult to discern in the absence of any reference or analysis by the Michigan Supreme Court in the *IBM* case to PA 282 or the amended law's retroactive application to January 1, 2008.

Taxpayers may not have to wait long, however, for the Michigan courts to address PA 282 and its attempt to retroactively eliminate the existence of the Compact as an element of Michigan law. The Michigan Court of Appeals is currently considering Treasury's appeal of a taxpayer-favorable Compact decision in June 2013 from

<sup>1</sup> *International Business Machines v. Michigan Department of Treasury*, 496 Mich. 642 (Mich. Jul. 14, 2014).

<sup>2</sup> The background, judicial history and implications of the *IBM* decision were summarized in the [Deloitte Tax Alert dated July 16, 2014](#).

<sup>3</sup> *International Business Machines v. Michigan Department of Treasury*, Order of the Michigan Supreme Court (Nov. 14, 2014).

<sup>4</sup> *International Business Machines*, 496 Mich. at 668.

<sup>5</sup> Public Act 282 of 2014, repealing MCL §§ 205.581 to 589; signed by Governor Snyder on Sept. 11, 2014, and filed with the Secretary of State on Sept. 12, 2014. The implications of P.A. 282 were summarized in the [Deloitte Tax Alert dated September 12, 2014](#).

<sup>6</sup> *International Business Machines v. Michigan Department of Treasury*, Order of the Michigan Supreme Court (Nov. 14, 2014).

<sup>7</sup> Even if Treasury were to file a writ of certiorari, the lack of a federal issue having been argued in the *IBM* case makes it unlikely the U.S. Supreme Court would take up the appeal.

the Michigan Court of Claims in *Anheuser-Busch, Inc. v. Michigan Department of Treasury*.<sup>8</sup> Similar to its approach in *IBM*, Treasury filed a statement of supplemental authority on September 17, 2014, highlighting PA 282's retroactive repeal of the Compact and contending that the law is dispositive of the taxpayer's appeal. The three-judge panel hearing the *Anheuser-Busch* appeal asked that the taxpayer file a supplemental brief in response concerning the effect of PA 282 on the case.<sup>9</sup> The Michigan Court of Appeals' decision in this matter may provide the first opportunity for a Michigan court to analyze the various constitutional arguments that taxpayers have raised as challenges to the retroactive effect of PA 282.<sup>10</sup>

## Taxpayer Considerations

To date, taxpayers that have challenged Treasury's disallowance of the Compact election on previously-filed MBT returns have requested an Informal Conference at the administrative hearing level or pursued an appeal before the Michigan Tax Tribunal or the Michigan Court of Claims. In nearly all instances these protests or appeals have been held in abeyance. It is unlikely that Treasury will seek to move these claims to any sort of resolution as a result of the developments in *IBM* until the constitutionality of the retroactive Compact repeal provisions of PA 282 is ultimately resolved.

## Contacts

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<sup>8</sup> *Anheuser-Busch, Inc. v. Michigan Department of Treasury*, Case No. 11-85-MT (Order and Opinion, Mich. Ct. of Claims Jun. 6, 2013). For further discussion of the *Anheuser-Busch* decision, please refer to the [Deloitte Tax Alert dated July 8, 2013](#).

<sup>9</sup> *Anheuser-Busch, Inc. v. Michigan Department of Treasury*, Order of the Michigan Court of Appeals, Sept. 19, 2014 (MTT Docket No. 316743 & 31697).

<sup>10</sup> It should be noted that the Michigan Court of Appeals ruled favorably on the Compact issue in *Lorillard Tobacco Company v. Michigan Department of Treasury*, MTT Docket No. 313256 (Sept. 16, 2014), citing the July 14<sup>th</sup> Michigan Supreme Court decision in *IBM* as dispositive of the Compact issue. The Michigan Court of Appeals recently refused to reconsider its decision. The potential exists for the Michigan Supreme Court to consider the retroactivity issue if Treasury seeks to appeal the *Lorillard* decision, and the Michigan Supreme Court accepts the appeal. Numerous Compact cases are also currently pending before the Michigan Court of Claims, where Chief Judge Michael Talbot has demonstrated a desire to move the cases forward expeditiously.