No.

IN THE

Supreme Court of the United States

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

v.

MICHIGAN DEPARTMENT OF TREASURY,

Respondent.

On Petition for Writ of Certiorari to the Michigan Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a State, without violating the constitutional bar against the impairment of contracts, retroactively withdraw from the Multistate Tax Compact so as to divest taxpayers of benefits under that Compact for a period of 6½ years before that withdrawal?

2. Consistent with due process, can a State, by statute, change its tax laws retroactively for a period of more than six years, where the change was not promptly instituted and where the change was designed to increase state tax revenues by overriding a Michigan Supreme Court decision determining taxpayer obligations under prior law?

PARTIES TO THE PROCEEDINGS

International Business Machines Corporation (IBM) was an Appellant in the Michigan Court of Appeals proceeding that resulted in the opinion and order dated September 29, 2015. The Court of Appeals' consolidated opinion addressed IBM's petition and other appeals filed by: Advance/New House Partnership; AK Steel Holding Corporation; Anheuser-Busch, LLC; Ball Corporation; Big Lots Stores, Inc.; Biorx, LLC; Cargill, Inc.; Circor Energy Products, Inc.; Commercial Metals Company; Coventry Health Care, Inc.; Crown Holdings, Inc.; Dollar Tree, Inc.; Fluor Corporation and subsidiaries; Gillette Commercial Operations North America & subsidiaries; Goodyear Tire & Rubber Company; Hallmark Marketing Company, LLC; Hansen Beverage Company; Ingram Micro, Inc.; International Business Machines Corporation; Interstate Gas Supply, Inc.; Kimball International Marketing, Inc.; Lord Corporation; Lubrizol Corporation; Michelin Corporation; Nintendo of America, Inc.; Paperweight Development Corporation; Ranier Investment Management, Inc.; Raven Industries, Inc.; Renaissance Learning, Inc.; Rodale, Inc.; Sapa Extrusions, Inc. fka Alcoa Extrusions, Inc.; Sonoco Products Company; Teradyne, Inc.; T-Mobile USA, Inc. and subsidiaries; United Stationers Supply Company; Watts Regulator Company; and Yaskawa America, Inc. Appellee in the case is Michigan Department of Treasury.

IBM was an Appellant in the Michigan Court of Appeals proceeding that resulted in the opinion and order dated January 21, 2016. The Court of Appeals' consolidated opinion addressed IBM's petition and other appeals filed by: Affinion Group Holdings, Inc. and subsidiaries; Ball Corporation; Deluxe Financial Services, LLC; EMC Corporation; Family Dollar Stores, Inc.; Goodyear Tire and Rubber Company; International Business Machines Corporation; Monster Beverage Corporation; Sapa Extrusions, Inc. fka Alcoa Extrusions, Inc.; Schwan's Home Service, Inc.; and Webloyalty Holdings, Inc. and subsidiaries. Appellee in the case is Michigan Department of Treasury.

RULE 29.6 STATEMENT

International Business Machines Corporation has no parent corporation, and no publicly held corporation owns 10 percent or more of IBM's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner International Business Machines Corporation ("IBM") prays that a writ of certiorari issue to review two judgments of the Michigan Court of Appeals.

OPINIONS BELOW

The first opinion of the Michigan Court of Appeals that is the subject of this Petition is dated September 29, 2015, reported at 878 N.W.2d 891 (Mich. Ct. App. 2015), and reprinted at App. 6a. It addresses Petitioner's 2010 tax year. The Michigan Supreme Court order denying leave to appeal, dated June 24, 2016, is reprinted at App. 1a. The underlying opinion of the Michigan Court of Claims, dated December 19, 2014, is unpublished and set forth at App. 78a.

The second opinion of the Michigan Court of Appeals, dated January 21, 2016, is unpublished and is set forth at App. 82a. It addresses Petitioner's 2009 tax year. The Michigan Supreme Court order denying leave to appeal, dated September 6, 2016, is reprinted at App. 80a. The opinion of the Michigan Court of Claims, dated December 19, 2014, is unpublished and set forth at App. 90a.

JURISDICTION

The Michigan Supreme Court order denying IBM's application for leave to appeal the first Court of Appeals decision was entered on June 24, 2016. On September 13, 2016, Justice Kagan granted an extension of time to and including November 21, 2016, to file this Petition.

The judgment of the Michigan Supreme Court, denying IBM's application for leave to appeal the second Michigan Court of Appeals decision, was entered on September 6, 2016.

As a result of the Michigan Supreme Court's denial of review, the Court of Appeals decisions, which address the federal questions presented, are reviewable by this Court, *Richmond v. Louisa R. Co.*, 54 U.S. (13 How.) 71, 80 (1852), and jurisdiction rests on 28 U.S.C. § 1257(a). This Petition is being filed within the time allowed in both cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the U.S. Constitution, Art. I, § 10, cl. 1, provides in relevant part: "No State shall *** pass any *** Law impairing the Obligation of Contracts." App. 273a.

The Due Process Clause in Section 1 of the Fourteenth Amendment to the U.S. Constitution provides: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." App. 271a.

Michigan 2014 PA 282 is reproduced at App. 147a.

STATEMENT

In 2014, Michigan retroactively increased the tax liability of IBM, and many other out-of-state corporations doing business in the State, by enacting a statute that purported to retroactively withdraw from the Multistate Tax Compact ("Compact") as of January 1, 2008. In enacting that explicitly retroactive tax statute (the "Retroactive Repeal"), the Michigan legislature overrode the actions and intent of at least three prior legislatures and a definitive interpretation of state tax law rendered by the Michigan Supreme Court in a case brought by IBM. That decision held that, having signed onto the Compact by statute in 1970, Michigan had granted taxpayers the right to apply the Compact's three-factor formula for apportioning income in computing their Michigan Business Tax ("MBT") liability.

The Michigan Court of Appeals sustained the Retroactive Repeal and the Michigan Supreme Court declined review. Thus, this Petition seeks certiorari to the Michigan Court of Appeals. As Justice Markman observed, dissenting from the Supreme Court's denial of review, this case squarely presents important federal questions, under both the Contract Clause and the Due Process Clause of the Fourteenth Amendment, concerning the constitutionality of retroactive tax legislation.

Contract Clause: This Court has held that a State's retroactive cancellation of its own contract obligations violates the Contract Clause. The Court has never implied an exception to this rule because the contract's subject matter involves taxes, or because the obligation arises from an interstate compact. The Compact bears all the relevant indicia of a binding agreement designed to benefit taxpayers. Therefore, Michigan's purported retroactive withdrawal from the Compact, in order to strip taxpayers of benefits that the Compact conferred upon them, violates the Contract Clause.

The Contract Clause issue arises here in an especially compelling setting of immediate practical importance: the Multistate Tax Compact. The basic purposes of the Compact were to offer taxpayers a uniform formula available in many states, to avoid the gouging of out-of-state corporations, to reduce the possibility of duplicative taxation, and to avoid federal preemption of state tax laws.

Furthermore, interstate compacts raise especially compelling Contract Clause concerns. Their purpose is to solve cross-border problems through contract and to obviate the need for litigation; they establish stability and predictability. Retroactive repeal is contrary to this basic purpose and generates the very instability and uncertainty that such interstate compacts are designed to eliminate.

Due Process: This Court has held that to be consistent with due process, a tax can be retroactively imposed only for legitimate reasons, such as the correction of mistakes, and only where the legislature acts promptly and the retroactive period is "modest." Michigan here sought to avoid paying refunds legally owed under the Michigan Supreme Court's decision that the Compact's apportionment election remained available to taxpayers until 2011, as it had been available since 1970. The Michigan legislature did not act promptly to repeal it for 2008 to 2011, but rather declined to act year after year, waiting until the issue had been raised in numerous cases and fully litigated through the state courts. Further, the 6½ year retroactive period is not, in any sense, "modest." IBM's business activities during the tax years affected by the 2014 legislation – 2009 and 2010 – had long been over and the MBT itself had already been replaced at the time of the retroactive legislation.

It is important for this Court to provide guidance for States determining permissible retroactive tax practices for their state legislatures. As States seek to raise revenue, the temptation not merely to tax, but to tax *retroactively*, is strong. As is evident here, out-of-state corporations are the most vulnerable. They often lack a constituency and effective voice in state legislatures. In this case, the net effect of the single-factor apportionment formula that Michigan made retroactive is to reduce the tax liabilities of Michigan companies with large in-state investments in people and property at the expense of out-of-state businesses by eliminating the two apportionment factors that are detrimental to in-state businesses (property and payroll). Although single-sales factor apportionment has never been found unconstitutional, many states have unapologetically moved to this apportionment scheme in order to shift the tax burden to businesses with minimal connections to the state.

Indeed, if the opportunity to tax retroactively is as wide open as the opinions below suggest, it would seem almost foolish for state legislatures not to utilize it, particularly in States now questioning whether they wish to be subject to the Compact. As seen below, state court decisions addressing the meaning and scope of this Court's statement that tax statutes may be retroactive for a "modest" period are in disarray. State courts necessarily look to this Court to provide meaningful guidance about federal constitutional constraints on retroactive taxation by state legislatures.

BACKGROUND AND FACTS

I. A Brief History of the Compact and Taxation in Michigan

A. The Compact Sought to Harmonize State Taxation to Avoid Federal Preemption

The Compact arose from concerns that Congress would enact federal legislation to regulate state taxation of interstate businesses. *Gillette Commercial Operations N. Am. v. Dep't of Treasury*, 878 N.W.2d 891, 899 (Mich. Ct. App. 2015) ("*IBM (TY2010)*"), App. 24a. Because different states used different formulas for apportioning income among states, taxpayers that operated in many states risked being taxed on more than 100 percent of their total income. See H.R. Rep. No. 88-1480, vol. 1, at 118-19, 596 ("Willis Report"). In response to a decision of this Court addressing the ground rules for apportioning income to particular states, Congress initiated a full-scale study of state taxation of multistate business. *See U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 454-456 (1978); Willis Report, vol. 1, at 8-9. The resulting report made specific legislative recommendations, including adoption of a single, mandatory apportionment formula to divide corporate income among the states, a uniform sales and use tax act, and federal oversight — in short, federal preemption of critical aspects of state taxation. *See* Willis Report, vol. 4, at 1133-38, 1143. Soon after the Report's release, a bill was introduced to implement these recommendations. H.R. 11798, 89th Cong. (1965).

States were highly motivated to suggest an alternative to federal legislation. *U.S. Steel*, 434 U.S. at 455-56; Council of State Governments, *Compact Summary and Analysis* 1 (1967) ("Development of the [C]ompact is the result of . . . the growing likelihood that federal action will curtail seriously existing State and local taxing power."). A preexisting model law had failed to spur uniformity or minimize duplicate taxation. An interstate compact offered a different and familiar approach to resolving interstate problems.

Thus, the Compact was a bargain struck by States, for the benefit of taxpayers, in order to assuage taxpayer and Congressional concern by establishing both a baseline level of uniformity and a way to avoid duplicate taxation and thereby to stave off federal preemption. Among the Compact's most important provisions was a guarantee that notwithstanding any other method of apportioning income provided by state law, a taxpayer could employ the three-factor formula set forth in Article IV of the Compact. See Art. III(2), App, 247a.

Michigan adopted the Compact effective in 1970. *See* Michigan Multistate Tax Compact Act, No. 343, 1969 Mich. Pub. Acts 770 (codified at Mich. Comp. Laws §§ 205.581-589), App. 244.

B. Michigan's Alternative Apportionment Formula

In 2007, Michigan enacted the MBT, which included a provision for apportioning income using a single factor, sales. *See* Mich. Comp. Laws § 208.1301(2), App. 242a. In so doing, the Michigan Legislature left intact the historic right to elect apportionment using the Compact's safety-valve formula, an equally-weighted, three-factor method composed of property, payroll, and sales. For companies that do not have significant property and payroll in Michigan, the effect of electing "out" of the MBT Act's single-factor method, and employing the Compact's three-factor method, is a reduction of the overall percentage of income apportioned to the State. *IBM (TY2010)*, App. 25a.

C. Michigan Prospectively Eliminates Election Starting in 2011

In 2010 the Michigan Legislature considered a bill that would have expressly prohibited taxpayer use of the Compact's three-factor apportionment election, retroactive to the enactment of the MBT in 2008. Mich. H.R. 6351, 95th Leg., Reg. Sess. (Mich. 2010), App. 239a. However, it ultimately decided against attempting a retroactive repeal of the Compact at that time.

The next year, Michigan enacted the Act of May 25, 2011, No. 40, 2011 Mich. Pub. Acts ccv, which provided that, effective January 1, 2011, the Compact's apportionment rules could no longer be applied to the MBT. App. 213a.

II. IBM Confirms the Right to Use the Compact Formula, Prompting "Retroactive Repeal"

A. The Supreme Court Holds that the Compact's Apportionment Provisions Are Available to Michigan Taxpayers.

In *IBM v. Dep't of Treasury*, 852 N.W.2d 865, (Mich. 2014) ("*IBM (TY2008)*"), App. 96a, the Michigan Supreme Court considered whether IBM (and other taxpayers) were entitled to continue to employ the Compact's apportionment formula, rather than the MBT Act's single sales factor formula, in calculating their 2008 tax liability. App. 100a-101a. The court held that until the 2011 repeal, the Compact's election provision remained fully operative. App. 117a-118a. On August 4, 2014, the Michigan Department of Treasury moved for rehearing, which was denied on November 14, 2014.

B. Michigan Legislature Retroactively Repeals the Compact

In response to *IBM (TY2008)*, a proviso for Retroactive Repeal was added to a bill pending in the Michigan Legislature, on September 9, 2014. Act of Sept. 11, 2014, No. 282, 2014 Mich. Pub. Acts 59, App. 147a. On September 11, 2014, the law was enacted, expressly repealing the Compact provisions, as codified under MCL 205.581 to MCL 205.589, purportedly with retroactive effect, as follows:

> 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal . . . is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act . . . and . . . to clarify that the election provision [of the Compact] . . . is not available . . . .

Enacting section 1, App. 187a. The purported effect of this Retroactive Repeal was to bar taxpayers from electing the three-factor apportionment formula, beginning with the 2008 tax year.

C. The Court of Claims Applies Retroactive Repeal

After enactment of the Retroactive Repeal, the Court of Claims issued opinions and orders in two cases in which taxpayers had sought to employ the Compact's apportionment formula, as had IBM: *Ingram Micro, Inc. v. Dep't of Treasury*, No. 11-000035-MT, 2014 WL 10320500 (Dec. 19, 2014) and *Yaskawa Am., Inc. v. Dep't of Treasury*, No. 11-000077-MT, 2014 WL 10474036 (Dec. 19, 2014). In both cases, the Court of Claims concluded that "PA 282 retroactively applies to this case, and all pending MBT refund actions filed in reliance on the Compact's elective, three-factor apportionment formula under the former MCL 205.581 *et seq*." *Ingram Micro*, 2014 WL 10320500 at *1; *Yaskawa*, 2014 WL 10474036 at *1.

III. The Current Cases: Retroactive Repeal Is Applied to IBM's 2009 and 2010 Tax Years

A. Respondent Denies IBM's Refund for 2009 and Assesses Millions of Dollars in Additional Tax for 2010

In 2012 and 2014, prior to the Retroactive Repeal, IBM filed cases in the Court of Claims seeking a refund of approximately $2.6 million for 2009 [12-000102-MT] and challenging an assessment of approximately $4.6 million for 2010 [14-000219-MT]. The Court of Claims initially held the cases in abeyance pending resolution of *IBM (TY 2008).* But rather than apply *IBM (TY2008),* allowing use of the Compact's apportionment formula for those tax years, the Court of Claims instead looked to the reasoning in *Ingram Micro* and *Yaskawa* and concluded that the Retroactive Repeal eliminated recourse to the Compact starting in 2008. As a result, the Court of Claims found that for the 2009 and 2010 tax years, "the Retroactive Repeal . . . negates the basis for [IBM's] claim[s]." App. 78a, 90a.

B. Michigan Court of Appeals Upholds Retroactive Repeal

IBM appealed for both the 2009 and 2010 tax years. On September 29, 2015, the Michigan Court of Appeals affirmed the decision on the 2010 tax year, holding that that the Compact was not a binding contract and that the Retroactive Repeal did not violate Due Process. *IBM (TY2010)*, App. 32a, 39a.

The Court of Appeals held that the Compact was not binding because, *inter alia*, States joined the Compact independently through their own laws, without imposing any reciprocal obligations on other States, and because the Compact expressly allowed for unilateral withdrawal by a State at any time. *IBM (TY2010)*, App. 36a-38a. (The court did not suggest that the Compact expressly allowed for *retroactive* withdrawal). Additionally, it said that Retroactive Repeal did not violate the Contract Clause because taxpayers could have no vested interests in continuation of particular tax laws. *Id.* at 38a.

The court then purported to apply this Court's decision in *United States v. Carlton*, 512 U.S. 26 (1994), to determine whether the Retroactive Repeal violated Due Process. First it declared that taxpayers had no vested interest in any particular tax rate, so they did not have a protectable interest under the Due Process Clause. *IBM (TY2010)*, App.

39a-40a. Then it found that the legislature's purposes of "1) correct[ing] a perceived misinterpretation of a statute" "and (2) eliminat[ing] a significant revenue loss" were purposes rationally furthered by the Retroactive Repeal. *Id.* at 47a. While the court correctly noted that *Carlton* had allowed only a "modest period" of retroactivity, it found that 6½ years was reasonable because similarly lengthy periods had been upheld by Michigan and other state courts. *Id.* at 49a.

On January 21, 2016, the Court of Appeals determined that the claims for refunds for the 2009 tax year were "identical in all relevant respects to the arguments raised by the plaintiffs in [*IBM (TY2010)*] . . . [and were] devoid of merit" for the reasons set forth in the *IBM (TY2010)* opinion. *Sapa Extrusions v. Dep't of Treasury*, 2016 Mich. App. LEXIS 137 ("*IBM (TY2009)*"), App. 88a-89a.

C. Michigan Supreme Court Denies Review of the Retroactivity Cases

IBM attempted to further appeal both *IBM (TY2009)* and *IBM (TY2010)*, but the Michigan Supreme Court declined to hear the cases. Justice Markman, joined by Justice Viviano, dissented because the cases presented issues "of considerable constitutional significance." *IBM v. Dep't of Treasury*, 880 N.W.2d 530, 530 (Mich. 2016) (Markman, J., dissenting), App. 1a. They noted, among other things, that significant questions were presented about whether the Retroactive Repeal was consistent with federal due process, and whether it violated the federal prohibitions on impairment of contracts. *Id.* at 2a-5a; *see also IBM v. Dep't of*

Treasury, 884 N.W.2d 269 (Mich. 2016) (denial of appeal for 2009 tax year), App. 80a.

REASONS TO GRANT THE PETITION

I. This Court Should Address the Two Questions Presented Here

As demonstrated below, the results and the reasoning of the Michigan Court of Appeals on the two questions presented find little or no support in the prior rulings of this Court. This Court has never endorsed a State's attempt to retroactively cancel its own contractual obligations, or deem what appears to be an agreement in every ordinary sense of the word, to be non-binding. And the "modest" degree of retroactivity found permissible for tax statutes bears no resemblance to the 6½ year period of retroactivity that the Michigan Court of Appeals declared acceptable here.

That these retroactivity issues arise here in the field of state taxation magnifies the need for this Court's review. As Justice Markman, dissenting from denial of review, observed in familiar terms, the potency of the taxation power – "the power to tax involves the power to destroy" – requires that the exercise of that power remain effectively constrained by constitutional limitations. App. 4a (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 431 (1819)). That constraint is particularly important "when, as here, a heightened tax burden has been imposed not on future business activities, but on business activities . . . undertaken many years ago." App. 4a.

This Court has observed the risks posed by unconstrained state taxation of income, such as multiple and duplicative taxation of income by companies doing business in many states. In this case, the effect of rejecting the Compact's three-factor formula, and imposing a single sales factor method of apportioning income, was to reduce the tax liabilities of Michigan companies at the expense of out-of-state businesses. This is the result of eliminating the two apportionment factors detrimental to in-state businesses (property and payroll).

Indeed, the temptation to raise revenue by targeting out-of-state businesses for heavy increases is especially great because these companies may lack the power and influence to curb legislative excess, and this is particularly true when the tax increase is retroactive. When tax burdens are imposed prospectively, businesses can adjust their actions accordingly and, indeed, argue to the legislature that imposing an increased tax burden will have negative consequences for the State's future economy. There is no similar argument available to defeat retroactive taxes.

The scope of authority to tax retroactively approved in *Carlton* has been understood differently by different States. Some courts have interpreted it broadly, thereby granting their state legislatures a potent power to raise revenue retroactively. Other state courts, hewing more closely to this Court's ruling in *Carlton*, have interpreted that authority narrowly, thereby limiting the options available to their state legislatures. The absence of clear guidance by this Court is thus unfair to those States that have construed *Carlton* as allowing retroactivity for only a truly "modest" period. Only this Court can settle the issue and clarify the scope of the power to tax retroactively so that legislatures in each state will be subject to the same federal standard.

That this case also involves the Compact, which guaranteed multi-state taxpayers access to at least one fair apportionment method, makes this an especially appropriate case for review. Over the last four decades our national economy has flourished on the foundation of the Compact's guarantees. Recent years have shown a trend toward States opting out of the Compact in order to raise revenue by imposing other methods of apportioning income. Whatever incentives exist to opt out of the Compact on a prospective basis would only be intensified if States could do so retroactively as well. That would not be a healthy development. Thus, it is important for this Court to address the due process and Contract Clause issues now, in this case.

II. Retroactive Repeal of the Compact Violates the Contract Clause

The Contract Clause prohibits substantial impairments of contracts unless "reasonable and necessary to serve an important public purpose." *U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25 (1977). As described below, the Compact is a binding contract, which imposes an obligation to honor commitments made to taxpayers while a member. The Retroactive Repeal substantially impairs this important obligation.

A. The Contract Clause Prohibits Substantial Impairment of Contractual Obligations, Including Those Imposed by Multistate Compacts

The Constitution prohibits state laws that impair contract obligations, including obligations imposed by contracts among states. *Green v. Biddle*, 21 U.S. (8 Wheat) 1, 9 (1823) ("[A] State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals."). Early in our history, this Court made clear that the Contract Clause bars laws impairing obligations under multistate compacts. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 566 (1852) (holding authorization of bridge unconstitutional because contrary to multistate compact provision regarding navigable waterways); *Green*, 21 U.S. (8 Wheat.) at 91-93 (invalidating Kentucky statute that materially impaired landowners' rights subject to a compact between Virginia and Kentucky); *see also Gen. Expressways, Inc. v. Iowa Reciprocity Bd.*, 163 N.W.2d 413, 420-21 (Iowa 1968) (interpreting statute to not conflict with compact to avoid violation of Contract Clause).

In *United States Trust*, 431 U.S. 1, this Court held that retroactive repeal of a covenant incorporated into the compact that created the Port Authority of New York and New Jersey violated the Contract Clause. In the instant case, Michigan has retroactively repealed a covenant in the Multistate Tax Compact. In *United States Trust*, this Court held that a State's evasion of a financial obligation is subject to special Contract Clause scrutiny. 431 U.S. at 24-25. In the instant case, Michigan is attempting to avoid paying tax refunds, or to justify tax assessments. For the reasons stated in *United States Trust*, Michigan's action violates the Contract Clause and must be set aside.

B. The Multistate Tax Compact is a Binding Contract

The Compact is a binding agreement of the parties.[1] It is styled as a "compact," which is defined as "[a]n agreement or covenant between two or more parties, esp. between governments or states." *Compact*, *Black's Law Dictionary* (10th ed. 2009). Indeed, in *United States Steel*, 434 U.S. 452, this Court readily assumed that the Compact was a legally binding contract when it held that it was constitutionally valid.

Furthermore, the internal evidence that the Compact is and was intended to be a binding agreement is overwhelming. The Compact is "enter[ed] into force" by the accession of at least seven States. Art. X, § 1, App. 267a. It becomes "effective" as to any other State when that State enacts the Compact. *Id.* Provisions regarding entry into force and effectiveness make no sense unless the Compact is legally binding rather than purely hortatory.

Furthermore, the Compact specifies that a State may "withdraw" by "enacting a statute repealing the same." Art. X, § 2, App. 267a. The concept of

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[1] Determining whether a contract is binding, and subject to the Contract Clause, is a federal question. *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992). Moreover, "determin[ing] the nature and scope of obligations as between States . . . is the function and duty of the Supreme Court." *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951).

withdrawal assumes that there is something to withdraw from. If the Compact were purely hortatory, there would be no need for a withdrawal mechanism. Article XII of the Compact provides that "[i]f this compact shall be held contrary to the constitution of any State participating therein, the compact shall remain in full force and effect as to the remaining party States." App. 268a. If the Compact were effective only as a statute of a participating State, this savings provision would not be necessary, since the invalidity of one State's statute ordinarily would have no implications for the validity of parallel legislation in another State. Because the Compact was intended as a binding legal agreement among States, it was necessary to prevent the invalidity of the agreement under one State's laws from causing the agreement to be invalid for all signatory States.

Perversely, the Michigan courts below relied on the withdrawal provisions in Article X to conclude that the Compact is not legally binding because States may unilaterally withdraw. Many contracts provide parties with a right to withdraw or cancel. Such withdrawal or cancellation rights do not render the agreements nonbinding or advisory. For example, as we are now aware, any member State has the right to withdraw from the European Union. Treaty on European Union, Art. 50. The existence of that withdrawal right does not render the European Union or the Treaty on European Union invalid. Nor does the withdrawal right invalidate rights granted under the Treaty on European Union to the member States and their citizens. There is a fundamental difference between being given a unilateral right to withdraw from, cancel, or terminate an agreement, on the one hand, and a unilateral right to withdraw from, cancel, or terminate obligations that accrued before withdrawal.

Moreover, this Compact is explicit that withdrawal from the Compact by a State does not operate retroactively. Section 2 of Article X of the Compact states that "[n]o withdrawal shall affect any liability already incurred by or chargeable to a party State prior to the time of such withdrawal." App. 267a. In other words, pre-existing liabilities must continue to be honored even after withdrawal. The obligation to permit a taxpayer to use the Article IV apportionment formula for years prior to withdrawal is such a pre-existing liability.

Consistent with that understanding, Section 3 of Article X provides that taxpayer arbitration proceedings pursuant to the Compact that commenced prior to withdrawal would continue despite the withdrawal of a State that is party thereto. App. 267a. Such arbitration proceedings could be instituted by a taxpayer under Article XI with respect to an allocation or apportionment issue. Although the arbitration process was implemented only briefly, *United States Steel*, 434 U.S. at 492-493, and is not currently in effect, *The Gillette Co. v. Franchise Tax Bd.*, 363 P.3d 94, 102 (Cal. 2015), the existence of the arbitration provision assuredly demonstrates an intention to create enforceable obligations in favor of taxpayers under the Compact. Thus, the withdrawal provisions bar a withdrawal from cutting off a valuable right being exercised by a taxpayer.

Even if the provision specifically limiting the retroactive effect of withdrawal was construed to apply only to some types of liabilities or obligations, it surely demonstrates that the Compact is a binding agreement for at least some purposes. And binding agreements simply do not contemplate the retroactive cancellation of accrued obligations. Withdrawal of a State from the Compact cannot affect pre-existing rights and liabilities.

The Michigan Court of Appeals relied on *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985), to support its conclusion that the Compact is not a binding contract, but rather merely parallel state legislation.[2] But that analysis misreads *Northeast Bancorp*. In *Northeast Bancorp*, the Court held that it had "some doubt" as to whether parallel legislation by Massachusetts and Connecticut amounted to a compact. 472 U.S. at 175. The Court noted that the parallel legislation at issue lacked several "classic indicia" of a compact. The Court did not conclude, however, that the "classic indicia" were absolute requirements for compact status.

In any event, the Compact shows the "classic indicia." The "classic indicia" discussed in *Northeast Bancorp* are: (1) joint organization or body for a

[2] The Compact is obviously more than a model law. It was created because a model law, the 1957 Uniform Division of Income for Tax Purposes Act, had been found ineffective to deal with the problems of multistate taxation. The Compact "symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer." *United States Steel*, 434 U.S. at 456.

regulatory or for any other purpose, (2) conditionality on action by another State, and (3) a requirement of reciprocation to enjoy the benefits conferred by the statute. 472 U.S. at 175. There clearly is a joint organization, the Multistate Tax Commission, which was found constitutional in *United States Steel*. The Commission has direct regulatory power, insofar as the Commission may enact a regulation that puts into effect the mandatory arbitration provisions of Article IX. Moreover, the Commission has the other purposes of proposing uniform regulations pursuant to Article VII and conducting audits. The Compact did not go into effect until at least seven States joined, which surely makes the Compact conditional on action by other States. Finally, many of the Compact's benefits are available only to members of the Compact. Only members have representatives on the Multistate Tax Commission. Only members may request an audit.

Petitioner IBM here recognizes that this Court denied certiorari in *Gillette*, where the petition raised issues about whether the Compact is a binding agreement. But in doing so, this Court may well have been influenced by the fact that the precise issue presented in that case was actually quite narrow. In *Gillette*, 363 P.3d 94, and *Kimberly-Clark Corp. v. Comm'r*, 880 N.W.2d 844 (Minn. 2016), the courts considered whether the Compact allowed, in essence, for partial withdrawal. Specifically, in those cases, the respective States had purported to withdraw only from the provisions of the Compact allowing use of the apportionment formula, but not from the Compact as a whole (pursuant to its withdrawal provision). The States relied on the fact that earlier in the Compact's history another State had opted out of the apportionment formula provision, but not the Compact as a whole. *See Gillette*, 363 P.3d at 101. Although the decisions approving the partial withdrawal speak in terms of whether the Compact is binding, the actual issue was, in fact, much narrower: whether the Compact should be construed to reflect a binding agreement that there should be no *partial* prospective withdrawal.

C. The Retroactive Repeal Substantially Impaired Obligations Imposed by the Multistate Tax Compact

Whether a law substantially impairs a contractual obligation hinges on the nature and significance of the impaired obligation. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245 (U.S. 1978) ("The severity of the impairment measures the height of the hurdle the state legislation must clear."). The withdrawal provision is one of the core terms of any contract, including the Compact. It affects the rights and responsibilities of not just the party withdrawing, but all parties, as well as taxpayers in the withdrawing states.

Courts considering whether an impairment was substantial have asked whether the parties got what they reasonably expected. See *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 416 (1983) (finding Kansas law capping gas price escalation clauses not significant impairment because contracts were expressly subject to relevant present and future state and federal law).

Analysis of the reasonable expectation factor in this case strongly weighs in favor of finding substantial impairment. States entered into the Compact to stave off federal preemption by making express statutory and contractual promises to taxpayers, including the promise to provide the Compact apportionment election. Not only is there nothing in the Compact that indicates it might be impaired, it promises on its face that each State will abide by all terms unless and until it withdraws pursuant to the Compact's withdrawal provision.

The closest case factually to this case is *United States Trust*, which involved the retroactive repeal of an agreement between two states regarding bonds issued by the Port Authority, a body created by a compact between New York and New Jersey. 431 U.S. 1, 3. This Court determined that retroactively and totally eliminating an important compact provision – as the apportionment election is an important provision in the Compact – constitutes a substantial impairment. *Id.* at 19. Moreover, the alleged purpose of the impairment was foreseeable when the compact was enacted, making "changed circumstances" unavailable as a justification. *Id.* at 31-32. "A governmental entity can always find a use for extra money . . . . If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at 26.

Michigan likewise has no legitimate public purpose in unilaterally eliminating the Compact's election retroactively. The tax consequences of the Compact and its election provision, namely fair and relatively uniform treatment of multistate businesses, were completely foreseeable upon enactment. These guarantees of the Compact have been relied on by businesses throughout the nation. They are part of the foundation on which our nation's economy rests. The decision of the Michigan Court of Appeals fundamentally undermines the efficacy and authority of the Multistate Tax Compact, which presents the Contract Clause question for this Court in a context of utmost practical and jurisprudential importance.

In *United States Trust*, this Court stated that a State "could bind itself in the future exercise of the taxing and spending powers." 431 U.S. at 24. Pursuant to the apportionment election under the Compact, Michigan did exactly that. This Court should determine whether Michigan can evade its obligations under the Compact through the expedient of retroactive repeal.

D. The Michigan Court of Appeals Decision Will Negatively Impact the Multistate Tax Compact

There are currently 16 member states of the Multistate Tax Compact.[3] Most impose a corporate income tax. For decades, IBM and scores of other corporations have done business and paid taxes in these states pursuant to their tax laws, which have included the Article IV apportionment election.[4]

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[3] The Compact members are Alabama, Alaska, Arkansas, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Missouri, Montana, New Mexico, North Dakota, Oregon, Texas, Utah, and Washington.

[4] Irrespective of Compact membership, most states at some point authorized taxpayers to apportion income using the Compact's three-factor formula. If Michigan's Retroactive Repeal is not invalidated, non-Compact member states may feel

(Continued...)

Many States, operating under revenue-generating pressure, have recently moved to withdraw from the Compact, prospectively. But if Michigan's retroactive approach to withdrawal is permitted to stand, the incentives to withdraw retroactively will be multiplied, and many more taxpayers will be faced with multi-million dollar tax assessments for old and cold tax years like IBM's $4.6 million MBT assessment for 2010.

III. Retroactive Repeal of the Compact Apportionment Election Violates the Due Process Clause

Retroactive legislation is generally repugnant to the rule of law. Rudimentary principles of fairness dictate that persons should be able to know what the law is when they act, allowing them to conform their conduct accordingly; settled expectations should remain settled. *See E. Enters. v. Apfel*, 524 U.S. 498, 532-33 (1998) ("Retroactivity is generally disfavored in the law in accordance with fundamental notions of justice that have been recognized throughout history." (internal citations omitted)); *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."); *see also Dash v. Van Kleeck*, 7 Johns. 477, 503 (N.Y. Sup. Ct. 1811) ("It is a principle in the English common law, as ancient as the law itself,

(Continued...)
equally emboldened to retroactively amend their apportionment formula in order to generate additional revenue.

that a statute, even of its omnipotent Parliament, is not to have a retrospective effect."); Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L.Rev. 425, 471 (1982) ("The rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance."); 2 Joseph Story, *Commentaries on the Constitution* § 1398 (5th ed. 1891) ("Retrospective laws are, indeed, generally unjust; and, as has been forcibly said, neither accord with sound legislation nor with the fundamental principles of the social compact.").

A. This Court's Decision in *Carlton* Establishes Limitations on Retroactive Tax Legislation

In *Carlton* this Court held that retroactive tax laws meet the requisites of the Due Process Clause only if supported by a legitimate legislative purpose furthered by rational means. 512 U.S. at 30-31. Given the principle that retroactive legislation is ordinarily repugnant to the rule of law, however, a tax, or tax methodology, that may easily pass constitutional muster on a *prospective* basis, may be unconstitutional if applied *retroactively*. *Carlton*, 512 U.S. at 30-31.

Legitimate Legislative Purpose: In *Carlton*, this Court held that curative legislation – enacted to promptly correct a mistake in a recently passed law in order to prevent unintended revenue loss – may satisfy the legitimate legislative purpose prong of the due process test. The retroactive statute in *Carlton* was easily recognized as a true curative measure. In October 1986, Congress had enacted a statute granting an estate tax deduction for half the proceeds of "any sale of employer securities by the executor of an estate" to an Employee Stock Ownership Plan ("ESOP"). 26 U.S.C. § 2057 (1982). Shortly thereafter, an opportunistic executor bought shares in a corporation, sold them to that company's ESOP at a loss, and claimed a large estate tax deduction. The IRS quickly realized that the intended deduction could be abused as a result of its inadvertent failure to ensure that the underlying transactions were *bona fide*. To prevent the law from being abused, in early 1987 – just a few months after the original enactment – the IRS proposed an amendment to provide that, to qualify for the deduction, the securities sold to an ESOP must have been "directly owned" by the decedent "immediately before death." Congress adopted the amendment in December 1987 with a 14-month period of retroactivity to the effective date of the original enactment.

Congress's "mistake" in *Carlton* was its failure to anticipate substantial revenue loss from the possibility of abusive tax transactions due to a glitch in the wording of the original statute. Rapidly correcting that mistake in order to prevent such abuse was, according to this Court, neither illegitimate nor arbitrary.

Rational Means: Whatever the law's purpose, that purpose must be pursued by "rational means." In *Carlton*, the retroactive tax law was sufficiently "rational" because Congress (1) acted promptly to correct its mistake; and (2) established only a modest period of retroactivity. 512 U.S. at 32.

This Court explicitly specified a promptness requirement in *Carlton*. And it easily found it satisfied there. The IRS identified the potential problem and Congress amended the statute within a few months of the original law, prior even to any litigation on the subject.

With respect to the "modest period" requirement, the Court held that a period of retroactivity of just over one year is permissible. *Carlton*, 512 U.S. at 33; *see also United States v. Darusmont*, 449 U.S. 292, 296–297 (1981) (per curiam) (Congress generally confines retroactive application of tax provisions to "short and limited periods required by the practicalities of producing national legislation."); *Welch v. Henry*, 305 U.S. 134, 150 (1938) ("[R]ecent transactions to which . . . a tax law may be retroactively applied must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment." (internal citations omitted)).[5]

The "actual retroactive effect" of the curative amendment in *Carlton* was only slightly greater than one year. Further, the only persons negatively affected by the retroactive amendment were those who had arguably abused the original statute by entering into tax-motivated transactions in order to generate a deduction. The period of retroactivity was, therefore, "modest."

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[5] A purported tax that seizes money with a retroactive effect that is more than "modest" is simply a naked taking of the taxpayer's property. *E. Enters. v. Apfel*, 524 U.S. 498, 534-37 (O'Connor, J., plurality opinion).

B. The Michigan Court of Appeals' Decision

In upholding the Retroactive Repeal, the Michigan Court of Appeals, citing its own precedent, held that a legislature may retroactively change the tax law to mend a leak in tax revenue "whether created by poor drafting of legislation in the first instance or by a judicial decision." *IBM (TY2010)*, App. 47a.

But *Carlton* does not go that far. *Carlton* held only that *rapid* correction of a mistake, to bar the abuse of a newly-enacted statute, was legitimate. Fixing what the current legislature views as a bad policy choice, even though the Supreme Court determined it was exactly what was intended by the prior legislature, is not "curative" within the meaning of *Carlton*.

As explained above, the entire purpose of the Compact's election provision was to allow the taxpayer to choose the apportionment formula it prefers. Since the time of the Compact's adoption, taxpayers could elect the apportionment formula that produced the lowest tax liability. Further, IBM's business, and the basis for the apportionment, was not a sham transaction; unlike the executor and other potential taxpayers in *Carlton,* IBM clearly was conducting normal business, not seeking to take advantage of unintended benefits.

To be sure, the Michigan legislature couched its purpose in enacting the 2014 Retroactive Repeal as an attempt to express, and restore, the intent of the 2007 legislature, which had enacted a different formula in connection with the MBT and supposedly intended to displace the Compact's election provision. But as the Michigan Supreme Court had already held, the 2007 legislature did not actually intend to repeal the Compact's election provision starting in 2008, or else it simply would have done so expressly. *IBM (TY2008)*, App. 115a. Rather, the controlling legislative intent was that of the 1970 legislature which had expressly guaranteed taxpayers access to the three factor apportionment formula in addition to any other formula allowed by state law, such as the formula in the MBT.

Indeed, States entered into the Compact based on the understanding that federal legislation – which would have severely curtailed states' individual taxing powers – would be taken off the table. That purpose of heading off federal legislation was never disputed even when the Compact was challenged in this Court. *U.S. Steel*, 434 U.S. at 455-56. As part of that effort, states provided taxpayers the guarantee of a unilaterally elective apportionment alternative. The Retroactive Repeal directly negates the intentions of the Michigan legislature that purposefully entered into the Compact four decades earlier.

In any event, as Justice O'Connor pointed out in her *Carlton* concurrence, the broad notion of correction adopted by the Michigan Supreme Court is illusory. 512 U.S. at 36 (O'Connor, J., concurring). Every legislative amendment to existing law is a correction in some sense, and a reaction to some perceived defect in prior law, whether crystallized by observation, or by a court decision construing the prior law. The notion that the 2014 legislature here was reading the mind of the prior legislature seven years earlier (with obvious turnover in the legislators themselves) is simply legal fiction. *See,* *e.g.*, *Cerro Metal Prod. v. Marshall*, 467 F. Supp. 869, 879 (E.D. Pa. 1979); *Pers. Fin. Co. of Braddock v. United States*, 86 F. Supp. 779, 784–85 (D. Del. 1949); *Hillman v. Nationwide Mut. Fire Ins. Co.*, 758 P.2d 1248, 1252-1253 (Alaska 1988); *Roth v. Yackley*, 396 N.E.2d 520, 522 (Ill. 1979); *Federal Express Corp. v. Skelton*, 578 S.W.2d 1, 8 (Ark. 1979).

In *Carlton* it was realistic to describe the avoidance of revenue losses resulting from defective statutory language as providing a legitimate corrective purpose for a modestly retroactive law. The law being corrected had inadvertently allowed tax-motivated transactions to result in an unintended tax deduction. Not so here. Here the ostensible correction was designed to overrule an elective income apportionment formula that had been in effect for decades.

Moreover, the "promptness" that the Court found determinative in *Carlton* is absent here. In *Carlton*, the government identified the issue, and diligently moved to correct it, all within a short time after the original enactment. That type of diligence to correct an ambiguity is assuredly to be encouraged. In this case, Michigan essentially it waited until the issue had been litigated through the entire Michigan court system – and the Michigan Supreme Court reached an entirely plausible, indeed, predictable, result – to reach back and repeal the entire compact retroactive to 2008.

Indeed, Michigan bypassed many opportunities to eliminate the Compact election provisions that might have better qualified as prompt: It could have done so with the enactment of the MBT in 2007. It could have done so shortly *after* the MBT's original enactment in 2007, when the issue whether the Compact's election provision was still available first arose at the Department of Treasury. It could have done so upon legislative review in 2010, but when the Legislature finally did act in 2011, it chose to leave the Compact in effect for 2008 – 2010. *Compare* 2010 Mich. H.R. 6351, App. 214a (unenacted bill providing for retroactive repeal of election provision as of 2008) *with* 2011 Mich. Pub. Acts No. 40, App. 188a (enacted version containing only prospective repeal). It is not clear that acting in 2010 would have qualified as prompt, particularly in view of the fact that the Compact itself had been the law of Michigan since 1970. But the legislature essentially confirmed that there had been no mistake when it repealed the Compact's apportionment provisions beginning on January 1, 2011.

Finally, a 6½ year period of retroactivity is anything but "modest." The fact that the retroactivity extended backwards for only a modest period was integral to this Court's approval of the retroactive statute in *Carlton*. The Court explained that the retroactive period of slightly more than one year reflected both precedent and practice. 512 U.S. at 34. As Justice O'Connor explained in her *Carlton* concurrence, the modest period requirement must be judged in view of the convention of extending tax legislation to "the year preceding the legislative session in which the law was enacted." 512 U.S. at 38 (O'Connor, J., concurring). Beyond that period, retroactive tax statutes present serious constitutional questions. A retroactive period of 6½ years is fundamentally inconsistent with this Court's use of the word "modest" and the conventions applied to retroactivity in the tax field.

The Michigan Court of Appeals treated the "modest period" requirement dismissively because it believed that taxpayers do not have a vested right in tax laws. *IBM (TY2010)*, App. 48a. As a rule applied to prospective legislation – and to truly modest retroactive changes – that may well be true. But that notion cannot be taken literally to mean that government has unlimited authority to tax retroactively, or to impair otherwise binding contracts.

In fact, the requirement that a period of retroactivity be modest reflects reliance interests invariably created by the passage of time. For decades, taxpayers like IBM, desiring to engage in multistate business, relied on the promise of the Compact – and the safety valve its apportionment formula promised – in conducting their interstate business. The Compact had a pervasive effect in limiting the ability of individual states to gouge out-of-state businesses as a means of raising revenue. Indeed, the development of our national commerce over the last 50 years undoubtedly owes much to the Compact, which quieted the revenue wars between States, and offered assurances of fairness to interstate businesses. Michigan's Retroactive Repeal fundamentally undermines that pervasive reliance on the Compact.

C. State Courts Are Sharply Divided on What Period of Retroactivity Is Permissible

The modest period directive, as applied in *Carlton*, seems to provide a clear guideline understandable to both legislators and reviewing courts. Yet state courts addressing a proliferation of attempts to tax retroactively have employed wildly disparate standards in judging such attempts, with perhaps the greatest diversity of opinion (and departures from *Carlton* itself) in the application of the modest period requirement.

Courts in at least four states have considered the length of the retroactive period to be of primary importance. The Supreme Court of South Carolina recognized that the length of the retroactive period was a prime consideration because "at some point . . . the government's interest in meeting its revenue requirements must yield to taxpayers' interest in finality regarding tax liabilities and credits." *Rivers v. State*, 490 S.E.2d 261, 264-65 (S.C. 1997) (finding a 2-3 year period "simply excessive"). In *City of Modesto v. National Med*, *Inc.,* 27 Cal. Rptr. 3d 215 (Ct. App. 2005), a California court considered and rejected an eight year period of retroactivity. *Id.* at 222 ("Generally in California, courts have upheld the retroactive application of tax laws only where such retroactivity was limited to the current tax year."). In *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 246 P.3d 211 (Wash. Ct. App. 2010), *rev'd on other grounds by* 269 P.3d 1013 (2012), the court found "no colorable argument" that a 24-year period of retroactive tax liability could satisfy *Carlton*'s modest period requirement. *Id.* at 218. And in *James Square Assocs. v. Mullen*, 993 N.E.2d 374 (N.Y. 2013), New York's high court concluded that a 16-to-32-month retroactive period was impermissibly long, concluding that "plaintiffs gained a reasonable expectation that they would secure repose in the existing tax scheme." *Id.* at 382-83.

On the other hand, several state courts have virtually ignored the "modesty" requirement, citing the circumstances of the case. *See, e.g.*, *Enter. Leasing Co. v. Ariz. Dep't of Revenue*, 211 P.3d 1, 6-7 (Ariz. Ct. App. 2008) (six-year retroactive period excused because law enacted only months after first refund claims filed); *King v. Campbell County*, 217 S.W.3d 862, 870 (Ky. Ct. App. 2006) (9 years of retroactivity permitted because legislature 'clarified' old law after unexpected judicial interpretation); *River Garden Retirement Home v. Franchise Tax Bd.*, 113 Cal. Rptr. 3d 62, 80-81 (Ct. App. 2010) (four-year period permissible because did not exceed statute of limitations for deficiency assessment).

And the Supreme Court of Kentucky held there is no particular "modest period" requirement and that time is always secondary to the particular circumstances of the case. *Miller v. Johnson Controls, Inc.*, 296 S.W.3d 392, 399 (Ky. 2009) (upholding a 5 – 9 year period of retroactivity in part because legislature only met every other year); *see also Montana Rail Link v. United States*, 76 F.3d 991, 994 (9th Cir. 1996) ("[A] one or two year period of retroactivity would have severely hurt workers who had retired expecting that they would receive a level of benefits based in part on tax payments made from 1983 through 1987."); *Moran Towing Corp. v. Urbach*, 1 A.D.3d 722, 724 (N.Y. App. Div. 2003) (upholding a 7-13 year period of retroactivity to cure unconstitutional prior legislation).

The Congressional Research Service has recognized the confusion, pointing out that no taxpayer, legislature, or court now knows exactly what constitutes a "modest period" of retroactivity. Erika K. Lunder, Robert Meltz, and Kenneth R. Thomas, Cong. Research Serv., R42791, *Constitutionality of Retroactive Tax Legislation* 3 (2012) (observing that "due process concerns are raised by an extended period of retroactivity").

Granting States unchecked permission to tax retroactively is unfair to taxpayers, particularly out-of-state taxpayers, who often make an easy target. But the disparity among states as to the applicable rules and standards is also unfair to many States. On the one hand, some state courts, notably now Michigan, have given broad license to their state legislatures to use retroactive taxes as the legislature deems appropriate. On the other hand, state courts that have interpreted *Carlton* and federal constitutional law as providing only a narrow basis to tax retroactively have limited the options of their state legislatures, as a matter of federal law. The disparity is simply unfair. All state legislatures must be subject to the same standards – at least as a matter of federal law. Only this Court can provide the necessary uniform guidance on this issue of federal law.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

SC: 152650
COA: 325484
Court of Claims: 14-000219-MT

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

June 24, 2016

ORDER

On order of the Court, the application for leave to appeal the September 29, 2015 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. (*dissenting*).

I respectfully dissent from this Court's order denying leave to appeal. Because the issues raised here are, in my judgment, of considerable constitutional significance as to matters affecting the tax policy and procedures, the fiscal and business environments, and the jurisprudence of this state, I believe they ought to be heard by the highest court of this state, and would thus grant leave to appeal.

In 1970, Michigan joined the Multistate Tax Compact (the Compact) when the Legislature enacted MCL 205.581. See 1969 PA 243, effective July 1, 1970. Article III(1) of the Compact provided that certain multistate taxpayers may elect to apportion income to Michigan for tax purposes "in the manner provided by the laws of such state," i.e., the laws of Michigan, or else "in accordance with Article IV." MCL 205.581, art III(1). Article IV provided for an apportionment formula based on property, payroll, and sales factors. MCL 205.581, art IV(9). Effective January 1, 2008, the Legislature enacted the Michigan Business Tax Act (BTA), MCL 208.1101 *et seq*., 2007 PA 36, which provided that "each tax base established under this act shall be apportioned in accordance with this chapter." MCL 208.1301(1). Finally, MCL 208.1301(2) of the BTA provided for an apportionment formula based solely on a sales factor.

At issue in *IBM v Dep't of Treasury*, 496 Mich 642 (2014), was whether the plaintiff multistate taxpayer could elect to use the Compact's three-factor apportionment formula for its 2008 Michigan taxes or whether, as the defendant Department of Treasury argued, it was required to use the BTA's sales-factor-only apportionment formula. This Court ruled in *IBM* that the taxpayer could elect to use the Compact's apportionment formula. The lead opinion stated that "the Legislature had [not] repealed the Compact's election provision by implication when it enacted the BTA," *id*. at 645 (opinion by VIVIANO, J.), while the concurring opinion left that question open, *id*. at 668 (ZAHRA, J., concurring). In response, the Legislature enacted 2014 PA 282, which repealed the Compact "retroactively and effective beginning January 1, 2008." 2014 PA 282, enacting § 1. As a consequence, 2014 PA 282 retroactively repealed the Compact election provision beginning that date as well. Several multistate taxpayers challenged the constitutionality of 2014 PA 282, but the Court of Claims and the Court of Appeals upheld the statute against those challenges. *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 401 (2015). In my judgment, the following four constitutional questions that are raised in the taxpayers' various applications for leave to appeal warrant thorough consideration by this Court by a grant of leave to appeal:

First, is 2014 PA 282 consistent with federal due-process protections, US Const, Ams V and XIV, given that the retroactivity period here of six years and nine months arguably exceeds "a modest period of retroactivity," *United States v Carlton*, 512 US 26, 32 (1994), and that one justice has observed in this same regard in a frequently cited statement that "[a] period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise . . . serious constitutional questions," *id*. at 38 (O'Connor, J., concurring in the judgment)?

Second, is 2014 PA 282 consistent with the Michigan Due Process Clause, Const 1963, art 1, § 17, when that clause is worded differently than the federal Due Process Clause and we have held that the state provision may afford heightened protections, *Delta Charter Twp v Dinolfo*, 419 Mich 253, 276 n 7 (1984), because "while the Federal supreme court is the final judge of violations of the Federal Constitution, the decision of the Supreme Court of this State is final on the question of whether or not a State statute conflicts with the State Constitution," *People v Victor*, 287 Mich 506, 514 (1939)?

Third, does 2014 PA 282 violate either the federal or state prohibitions against the impairment of contracts, US Const, art I, § 10, cl 1; Const 1963, art 1, § 10, because the Compact is a reciprocal and binding interstate compact between the signatory states with respect to which a retroactive withdrawal from the Compact amounts to an unconstitutional impairment of that contract, see *Gillette Co v Franchise Tax Bd*, 62 Cal 4th 468, 477-479 (2015)?

Fourth, does 2014 PA 282 violate the Separation of Powers Clause, Const 1963, art 3, § 2, because by prescribing the outcomes of those cases that were held in abeyance pending *IBM*, as well as *IBM* itself, the Legislature has impinged on the judicial power, Const 1963, art 6, § 1, and contravened the principle that "the Legislature cannot dictate to the courts what their judgments shall be, or set aside or alter such judgments after they have been rendered," *People ex rel Sutherland v Governor*, 29 Mich 320, 325-326 (1874); cf. *Plaut v Spendthrift Farm, Inc*, 514 US 211, 217-218 (1995) ("Congress has exceeded its authority by requiring the federal courts to exercise '[t]he judicial Power of the United States,' U. S. Const., Art. III, § 1, in a manner repugnant to the text, structure, and traditions of Article III.")?

As the United States Supreme Court has recognized, "[T]he power to tax involves the power to destroy[.]" *M'Culloch v Maryland*, 17 US (4 Wheat) 316, 431 (1819). This power must be kept subject to proper constitutional limits, particularly when, as here, a heightened tax burden has been imposed not on future business activities, but on business activities planned and undertaken many years ago. While I do not yet have any firm belief regarding the constitutionality of 2014 PA 282, I do have a firm belief that before retroactive tax burdens such as those set forth in this law are imposed, the arguments of affected taxpayers deserve consideration by the highest court of this state. Accordingly, I respectfully dissent and would grant leave to appeal.

VIVIANO, J., joins the statement of MARKMAN, J.

[SEAL] I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 24, 2016 /s/ Larry S. Royster
Clerk

APPENDIX B

FOR PUBLICATION

STATE OF MICHIGAN
COURT OF APPEALS

No. 325258
Court of Claims LC No. 14-000053-MT

GILLETTE COMMERCIAL OPERATIONS NORTH AMERICA & SUBSIDIARIES,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325475
Court of Claims LC No. 11-000077-MT

YASKAWA AMERICA, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325476
Court of Claims LC No. 13-000015-MT

RAINIER INVESTMENT MANAGEMENT, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325477
Court of Claims LC No. 13-000090-MT

RAINIER INVESTMENT MANAGEMENT, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325478
Court of Claims LC No. 13-000110-MT

RAINIER INVESTMENT MANAGEMENT, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325479
Court of Claims LC No. 12-000032-MT

RAINIER INVESTMENT MANAGEMENT, INC.,
Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,
Defendant-Appellee.

No. 325480
Court of Claims LC No. 11-000080-MT

HANSEN BEVERAGE COMPANY,
Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,
Defendant-Appellee.

No. 325481
Court of Claims LC No. 11-000127-MT

COVENTRY HEALTH CARE, INC.,
Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,
Defendant-Appellee.

No. 325482
Court of Claims LC No. 13-000052-MT

YASKAWA AMERICA, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325483
Court of Claims LC No. 12-000155-MT

YASKAWA AMERICA, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325484
Court of Claims LC No. 14-000219-MT

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325485
Court of Claims LC No. 12-000160-MT

PAPERWEIGHT DEVELOPMENT CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325486
Court of Claims LC No. 12-000075-MT

PAPERWEIGHT DEVELOPMENT CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325487
Court of Claims LC No. 14-000192-MT

DOLLAR TREE, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325488
Court of Claims LC No. 13-000123-MT

BALL CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325489
Court of Claims LC No. 12-000161-MT

COMMERCIAL METALS COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325490
Court of Claims LC No. 12-000087-MT

COMMERCIAL METALS COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325491
Court of Claims LC No. 14-000030-MT

DOLLAR TREE, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325492
Court of Claims LC No. 11-000128-MT

BIORX, LLC,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325505
Court of Claims LC No. 14-000142-MT

SONOCO PRODUCTS COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325506
Court of Claims LC No. 13-000111-MT

ANHEUSER-BUSCH, LLC,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325507
Court of Claims LC No. 11-000035-MT

INGRAM MICRO, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325508
Court of Claims LC No. 12-000093-MT

RENAISSANCE LEARNING, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325509
Court of Claims LC No. 13-000006-MT

RENAISSANCE LEARNING, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325510
Court of Claims LC No. 13-000074-MT

AK STEEL HOLDING CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325511
Court of Claims LC No. 14-000067-MT

ADVANCE/NEW HOUSE PARTNERSHIP,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325515
Court of Claims LC No. 12-000059-MT

UNITED STATIONERS SUPPLY COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325516
Court of Claims LC No. 12-000101-MT

RODALE, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325517
Court of Claims LC No. 13-000098-MT

CIRCOR ENERGY PRODUCTS, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325518
Court of Claims LC No. 13-000106-MT

CROWN HOLDINGS, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325520
Court of Claims LC No. 14-000217-MT

MICHELIN CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325522
Court of Claims LC No. 14-000144-MT

INTERSTATE GAS SUPPLY, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325523
Court of Claims LC No. 14-000070-MT

INTERSTATE GAS SUPPLY, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325525
Court of Claims LC No. 14-000157-MT

SAPA EXTRUSIONS, INC., formerly known as ALCOA EXTRUSIONS, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325526
Court of Claims LC No. 14-000037-MT

RAVEN INDUSTRIES, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325528
Court of Claims LC No. 12-000113-MT

CARGILL, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325529
Court of Claims LC No. 13-000021-MT

WATTS REGULATOR COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325532
Court of Claims LC No. 13-000041-MT

WATTS REGULATOR COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325533
Court of Claims LC No. 14-000010-MT

WATTS REGULATOR COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325534
Court of Claims LC No. 13-000124-MT

LORD CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325535
Court of Claims LC No. 12-000063-MT

TERADYNE, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325541
Court of Claims LC No. 14-000143-MT

LUBRIZOL CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325972
Court of Claims LC No. 14-000024-MT

GOODYEAR TIRE & RUBBER COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 325974
Court of Claims LC No. 15-000009-MT

HALLMARK MARKETING COMPANY, LLC,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326039
Court of Claims LC No. 13-000133-MT

BIG LOTS STORES, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326075
Court of Claims LC No. 14-000300-MT

KIMBALL INTERNATIONAL MARKETING, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326080
Court of Claims LC No. 14-000253-MT

NINTENDO OF AMERICA, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326110
Court of Claims LC No. 14-000206-MT

ADVANCE/NEWHOUSE PARTNERSHIP,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326123
Court of Claims LC No. 14-000292-MT

FLUOR CORPORATION AND SUBSIDIARIES,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326136
Court of Claims LC No. 14-000276-MT

T-MOBILE USA, INC., AND SUBSIDIARIES,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

September 29, 2015
9:00 a.m.

Before: MURRAY, P.J., and JANSEN and METER, JJ.

MURRAY, P.J.

I. INTRODUCTION

In these consolidated appeals, numerous foreign[1] corporations doing business in Michigan appeal as of right the trial court's orders granting summary disposition to defendant, the Michigan Department of Treasury, pursuant to MCR 2.116(I)(1), and dismissing their complaints.

These cases involve a significant number of state and federal constitutional challenges to 2014 PA 282, which the Legislature—taking the cue from the Supreme Court in *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) (*IBM*)—enacted to retroactively rescind Michigan's membership in the Multistate Tax Compact (the Compact), precluding foreign corporations from utilizing a three-factor apportionment formula previously available under the Compact. See former MCL 205.581 *et seq*., as enacted by 1969 PA 343. In a well-written and well-reasoned opinion, the trial court rejected each of the constitutional challenges.[2] For the reasons

[1] By foreign we mean corporations that were incorporated outside Michigan, not necessarily outside the United States.

[2] The trial court, MICHAEL J TALBOT, J., issued two full opinions in these cases. The orders resolving the other cases referred back to the reasoning set forth in those opinions. For ease of reference, when we refer to the trial court's reasoning, we are referring to the reasoning set forth in *Yaskawa America, Inc v Dep't of Treasury*, unpublished opinion and order of the Court of Claims, issued December 19, 2014 (Case No. 11-000077-MT).

expressed below, so do we. Consequently, we affirm the trial court's final orders of dismissal.

II. BACKGROUND FACTS AND PROCEDURAL HISTORY

Rather than re-creating the wheel, we adopt the trial court's recitation of the background facts leading to these lawsuits:

> History of the Compact
>
> The Compact is an interstate tax agreement that was originally enacted in 1967 by the legislatures of seven states. The Compact was initially drafted out of concerns of state sovereignty in reaction to the introduction of federal legislation that sought to regulate various areas of state taxation.[3] The original purposes of the Compact included:
>
>> (1) facilitating proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes; (2) promoting uniformity and compatibility in state tax systems; (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation. [*US Steel Corp v Multistate Tax*

[3] The legislation, which was never enacted, was introduced in the wake of *Northwestern States Portland Cement Co v Minnesota*, 358 US 450; 79 S Ct 357; 3 L Ed 2d 421 (1959), which held that there is no Commerce Clause barrier to the imposition of a direct income tax on a foreign corporation carrying on interstate business within a taxing state.

> *Comm*, 434 US 452, 456; 98 S Ct 799; 54 L Ed 2d 682 (1978).[4]]

Michigan adopted the Compact provisions, effective in 1970, through enactment of 1969 PA 343.

> Apportionment Formulas under the Compact and the MBT Act
>
> The present case, and others like it, concern two alternative methods of apportioning income for purposes of calculating [Michigan business tax (MBT)]. Under the MBT Act, created by 2007 PA 36,[5] 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 MBT Act'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.
>
> Decision in *IBM*
>
> In *IBM*, 496 Mich 642, the Supreme Court considered the issue of whether MBT taxpayers must use a single-factor apportionment formula as mandated by the MBT Act or whether MBT taxpayers may elect to apply a three-factor apportionment formula under the Compact. The

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[4] The Compact was never approved by Congress, but it was upheld against constitutional challenges in *US Steel*, 434 US 452.

[5] For a history of business taxation in Michigan, see *IBM*, 496 Mich at 648-650.

parties were asked by the Court to brief four issues:

> (1) whether the plaintiff could elect to use the apportionment formula provided in the Multistate Tax Compact, MCL 205.581, in calculating its 2008 tax liability to the State of Michigan, or whether it was required to use the apportionment formula provided in the Michigan Business Tax Act, MCL 208.1101 *et seq*.; (2) whether § 301 of the Michigan Business Tax Act, MCL 208.1301, repealed by implication Article III(1) of the Multistate Tax Compact; (3) whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member state; and (4) whether the modified gross receipts tax component of the Michigan Business Tax Act constitutes an income tax under the Multistate Tax Compact. [*Int'l Business Machines v Dep't of Treasury*, 494 Mich 874; 832 NW2d 388 (2013).]

In its decision, the Court determined that for tax years 2008 through 2010,[6] 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"

[6] The Legislature explicitly repealed the Compact apportionment provisions effective January 1, 2011, through enactment of 2011 PA 40.

within the meaning of the Compact. The Court did not reach the third issue of whether the Compact constitutes a contract. On November 14, 2014, the Michigan Supreme Court denied reconsideration. *Int'l Business Machines v Dep't of Treasury*, [497 Mich 894]; 855 NW2d 512 (2014).

Retroactive Repeal of the Compact Provisions by [2014] PA 282

On September 11, 2014, 2013 SB 156 (SB 156) was enacted into law as [2014] PA 282, amending the MBT Act and expressly repealing the Compact provisions, as codified under MCL 205.581 to MCL 205.589. The Legislature gave the Act retroactive effect by providing as follows:

> Enacting section 1. 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA 343, MCL 205.581, is not available under the

> income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713.
>
> [2014] PA 282 thus amended the MBT Act to express the "original intent" of the Legislature with regard to (1) the repeal of the Compact provisions, (2) application of the MBT Act's apportionment provision under MCL 208.1301, and (3) the intended effect of the Compact's election provision under MCL 205.581.[8] The effect of the amendments, as written, retroactively eliminates a taxpayer's ability to elect a three-factor apportionment formula in calculating tax liability under both the MBT Act and income tax act.

Between 2011 and 2015 these multistate taxpayers all filed suit in the Court of Claims seeking refunds due under the Compact that had been refused by Treasury on the ground that the only apportionment method available was that established by the MBT. Most of the cases were filed prior to the Supreme Court's resolution of *IBM*, so the trial court prudently held the cases in abeyance pending that decision. Ultimately, however, the case was resolved not by the *IBM* decision, but by passage of 2014 PA 282, at least once the trial court upheld the statute against plaintiffs' constitutional challenges. We now turn our attention to those same constitutional arguments.

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[8] [2014] PA 282 also clarified that the Compact's election provision is not available under the income tax act of 1967, 1967 PA 281.

III. ANALYSIS

A. STANDARDS OF REVIEW

The trial court entered summary disposition in favor of Treasury under MCR 2.116(I)(1), a decision which we review de novo. *Kenefick v Battle Creek*, 284 Mich App 653, 654; 774 NW2d 925 (2009). 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 likewise pay no deference to the trial court's statutory interpretation or resolution of constitutional issues, as both of those issues also require review de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013); *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).[3]

B. GENERAL PRINCIPLES

Before delving into our analysis of these issues, we first set forth in chronological sequence several undisputed factual matters and legal principles that, although partially contained in Part II of this opinion, are worth keeping in mind as they provide critical background for our decision:

1. Michigan became a member state to the Compact in 1970.

2. A member state can withdraw from the Compact by "enacting a statute repealing the same." Former MCL 205.581, art X(2).

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[3] Though we can give no deference to the trial court's legal rulings, unlike the deference we give to discretionary calls on evidence or findings of fact, we nevertheless give the trial court's legal rulings careful consideration.

3. Under the Compact as originally enacted, a foreign business taxpayer had the option of either utilizing the apportionment formula under the Compact or what was available under a state's tax laws. Former MCL 205.581, art III.

4. The Michigan Business Tax Act, enacted into law in 2007 and effective January 1, 2008, required foreign business taxpayers to use the apportionment formula contained in the act. MCL 208.1301(2) and MCL 208.1303.

5. In 2011, the Legislature repealed the apportionment provision of the Compact, effective January 1, 2011. 2011 PA 40.

6. In *IBM*, the Supreme Court held that through 2011 PA 40 the Legislature created a window (from January 1, 2008 until January 1, 2011) wherein certain taxpayers could still utilize the apportionment option available under Article IV of the Compact. The Court recognized that the Legislature "could have—but did not—extend this retroactive repeal to the start date of the [MBT]." *IBM*, 496 Mich at 659.

7. In response to the *IBM* decision, the Legislature enacted 2014 PA 282, which retroactively repealed the Compact to the start date of the MBT. 2014 PA 282 therefore eliminated the three-year window the *IBM* Court stated was created by 2011 PA 40.

8. In general, it is constitutional for tax statutes to be retroactively amended, and taxpayers do not generally have a vested interest in tax laws that exist at any particular moment. *United States v Carlton*, 512 US 26, 30; 114 S Ct 2018; 129 L Ed 2d 22 (1994).

With these principles and facts in mind, we now turn our attention to the precise arguments put forth by the parties.

C. STATE AND FEDERAL CONTRACTS CLAUSES

We first address whether repeal of the Compact through 2014 PA 282 violated the Contracts Clauses of the state and federal Constitutions. The United States Constitution provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ," US Const, art I, § 10, cl 1, while our state Constitution similarly provides that "[n]o . . . law impairing the obligation of contract shall be enacted," Const 1963, art 1, § 10. In conducting this constitutional review, we give deference to the legislative branch by presuming statutes to be constitutional, and we will construe statutes as constitutional unless their unconstitutionality is clearly apparent. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 307; 806 NW2d 683 (2011). This presumption is "'especially strong'" when tax legislation is concerned. *Id*. at 308 (citation omitted).

Like many provisions of the federal Constitution, the Contracts Clause has not been applied by the Supreme Court according to its plain, unequivocal language. As that Court has acknowledged, "[a]lthough the language of the Contract Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group, Inc v Kansas Power & Light Co*, 459 US 400, 410; 103 S Ct 697; 74 L Ed 2d 569 (1983), quoting *Home Bldg & Loan Ass'n v Blaisdell*, 290 US 398, 434; 54 S Ct 231; 78 L Ed 413 (1934). In order to determine whether the clause's prohibition should be accommodated, the

Supreme Court developed a three-part test. The first part of the three-part test is "whether the change in state law has 'operated as a substantial impairment of a contractual relationship.'" *Gen Motors Corp v Romein*, 503 US 181, 186; 112 S Ct 1105; 117 L Ed 2d 328 (1992), quoting *Allied Structural Steel Co v Spannaus*, 438 US 234, 244; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

Whether a change in state law has resulted in "a substantial impairment of a contractual relationship" itself requires consideration of three factors: "[1] whether there is a contractual relationship, [2] whether a change in law impairs that contractual relationship, and [3] whether the impairment is substantial." *Romein*, 503 US at 186. If this first prong of the test is met, i.e., "[i]f the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . ." *Energy Reserves Group*, 459 US at 411. Finally, the third part of the test is "whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *Id*. at 412 (citation and quotation marks omitted; alterations in original). See also *Borman LLC v 18718 Borman, LLC*, 777 F3d 816, 824-825 (CA 6, 2015).[4]

We agree with the trial court that the Compact is not a binding contract under Michigan law. Because Congress did not approve the Compact, Michigan law governs its interpretation. See *McComb v Wambaugh*,

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[4] Lower federal court decisions are not binding on this Court but may be considered for their persuasive value. *Abela v Gen Motors Corp*, 469 Mich 603, 606-607; 677 NW2d 325 (2004).

934 F2d 474, 479 (CA 3, 1991) (stating that where the consent of Congress is not obtained, a compact does not express federal law and must be construed as state law). The trial court provided the following analysis of the Compact under Michigan law, with which we are in full agreement:

> In Michigan, there is a "strong presumption that statutes do not create contractual rights." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005). "In order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the Legislature intended to be bound to a contract." *Id*. at 662 (quotation marks and citation omitted). As noted in the dissent in *IBM*, "[t]his presumption is grounded in the principle that 'surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments.'" *IBM*, 496 Mich at 682 (MCCORMACK, J., dissenting), quoting *Studier*, 472 Mich at 661.
>
> There are no words in the Compact, as adopted by the Legislature under 1969 PA 343, that indicate that the state intended to be bound to the Compact, and specifically to Article III(1). Therefore, the presumption must be that the state did not surrender its legislative power to require use of a particular apportionment formula. Such interpretation comports with the Supreme Court's recognition of "the basic principle[] that the States have

> wide latitude in the selection of apportionment formulas . . . ." *Moorman* [*Mfg Co v Blair*], 437 US [267,] 274[; 98 S Ct 2340; 57 L Ed 2d 197 (1978)]. This interpretation is also consistent with the Court's recent acknowledgement that states "do not easily cede their sovereign powers . . . ." *Tarrant* [*Regional Water Dist v Herrmann*], [569 US ___, ___;] 133 S Ct [2120,] 2132[; 186 L Ed 2d 153 (2013)]. Because there is no clear indication under MCL 205.581 that the state contracted away its ability to either select an apportionment formula that differs from the Compact, or to repeal the Compact altogether, the Court concludes that no contractual obligation was created by enactment of 1969 PA 343 that would prohibit the enactment of [2014] PA 282.

See also *IBM*, 496 Mich at 683 (MCCORMACK, J., dissenting) (opining that the Compact's withdrawal provision was "strong evidence that the member states did not intend to be contractually bound, as it demonstrates the member states' desire to retain control over their sovereignty with respect to taxation"). Accordingly, plaintiffs' state and federal Contracts Clause arguments are unavailing because they are premised on the incorrect view that the Compact comprises a binding contract under state law.[5] See *Romein*, 503 US at 186.

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[5] We also point out that because a Legislature cannot bind a subsequent Legislature under Michigan law, 1969 PA 343 did not restrict a subsequent Legislature's ability to correct an error prospectively or retroactively. See, e.g., *Studier*, 472 Mich at 660; *LeRoux v Secretary of State*, 465 Mich 594, 615-616; 640 NW2d 849 (2002). See also *Atlas v Wayne Co Bd of Auditors*, 281 Mich

However, plaintiffs also argue, using law developed under the federal Compact Clause, US Const, art I, § 10, cl 3,[6] that Michigan created binding contractual obligations by entering into the Compact and that those binding obligations are enforceable under the Contracts Clause. See, e.g., *Thompson v Auditor General*, 261 Mich 624, 636; 247 NW 360 (1933), citing *Green v Biddle*, 21 US (8 Wheat) 1; 5 L Ed 547 (1823); *Doe v Ward*, 124 F Supp 2d 900, 915 n 20 (WD Penn, 2000), quoting *Aveline v Pennsylvania Bd of Probation & Parole*, 729 A2d 1254, 1257 n 10 (Pa, 1999). Relying upon caselaw addressing whether an agreement between two or more states constitutes a compact for purposes of the Compact Clause, in its own words the trial court considered "[t]he three 'classic indicia' of a binding interstate compact[, which] are (1) the establishment of a joint regulatory body, (2) the requirement of reciprocal action for effectiveness, and (3) the prohibition of unilateral modification or repeal." See *Northeast Bancorp, Inc v Bd of Governors of the Fed Reserve Sys*, 472 US 159, 175; 105 S Ct 2545;

596, 599; 275 NW 507 (1937) ("The power to amend and repeal legislation as well as to enact it is vested in the legislature, and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one legislature restrict or limit the power of its successors.").

[6] Plaintiffs do not allege a violation of the Compact Clause, and for good reason. According to the Supreme Court, the Compact Clause is limited to "agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'" *US Steel*, 434 US at 471, quoting *Virginia v Tennessee*, 148 US 503, 519; 13 S Ct 728; 37 L Ed 537 (1893). The Compact does nothing of the sort, and essentially exists for the benefit of multistate taxpayers. It gives no advantage to the states vis-a-vis the federal government.

86 L Ed 2d 112 (1985), and *Seattle Master Builders Ass'n v Pacific Northwest Electric Power & Conservation Planning Council*, 786 F2d 1359, 1363 (CA 9, 1986). Applying these same factors, we conclude that the Compact contained no features of a binding interstate compact and, therefore, was not a compact enforceable under the Contracts Clause.

With respect to the first factor, whether the Compact created a joint regulatory agency, although the Compact created the Multistate Tax Commission, former MCL 205.581, art VI, it did not confer any governing or regulatory powers on that body. Rather, the Commission's powers included studying state and local tax systems, developing and recommending proposals for greater uniformity, and compiling information helpful to the party states. Former MCL 205.581, art VI(3). As the trial court noted, "[n]one of these purposes is regulatory, and it in no way indicates a delegation of sovereign authority to tax," a point the Court in *US Steel Corp*, 434 US at 473, also made clear:

> [The Compact] does not purport to authorize the member States to exercise any powers they could not exercise in its absence. *Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission*. [Emphasis added.]

Concerning the second factor, we adopt the trial court's analysis and its conclusion that the Compact did not require reciprocal action:

> There is nothing reciprocal about the Compact's provisions. Each member state

> operates its respective tax systems independently from the tax systems of other Member States, and the determination of tax in one state is generally independent of the determination in another state. With respect to apportionment formulas, in particular, Articles III(1) and IV's application in one member state has no bearing on another state. And the functionality of one member state's apportionment methodology does not hinge on whether another member state's apportionment methodology is reciprocal in nature. As the Supreme Court recognized in *Moorman Mfg Co* [437 US at 274], "the States have wide latitude in the selection of apportionment formulas." Consistent with *Moorman*, a Member State's decision to allow or eliminate a certain apportionment formula is unaffected by the choice of formula that another member state has made.

Finally, with regard to the third factor, the Compact allows unilateral modification and withdrawal. The Compact expressly says that member states are free to withdraw unilaterally without notice to other member states. As previously noted, former MCL 205.581, art X(2), provides that a state may withdraw from the Compact by enacting a statute repealing it. See also *US Steel Corp*, 434 US at 473 ("[E]ach State is free to withdraw at any time."). Because the Compact specifically allows member states to unilaterally withdraw (subject to one condition, discussed later in this opinion) by merely passing legislation doing so, which is precisely what Michigan did through 2014 PA 282, we hold that the Compact was not a binding agreement on this state. Instead, it was an advisory agreement that was agreed to by participating states as a means of addressing interstate business taxation and threatened federal intervention into that area. 2014 PA 282, which removed the state as a member of the Compact, was therefore not prohibited.[7]

Before concluding on this issue, we point out that even if there was a binding contractual commitment on the part of the state, there likely would still be no violation of the Contracts Clause. The United States Court of Appeals for the Sixth Circuit recently stated that "an impairment takes on constitutional dimensions only when it interferes with reasonably expected contractual benefits." *Borman LLC*, 777 F3d at 826, citing *US Trust Co of New York v New Jersey*, 431 US 1, 21, 31; 97 S Ct 1505; 52 L Ed 2d 92 (1977). As the Supreme Court has previously declared, "a statute does not violate the Contract Clause simply because it has the effect of restricting, or even barring altogether, the performance of duties created by contracts entered into prior to its enactment." *Exxon Corp v Eagerton*, 462 US 176, 190; 103 S Ct 2296; 76 L Ed 2d 497 (1983). Given the fact that these taxpayers have no vested interest in the continuation of a tax law, and that tax law is one of the more highly regulated areas in the law, it is difficult to see what reasonable expectation was actually interfered with. See, e.g., *All Star, Inc v Georgia Atlanta Amusements, LLC*, 332 Ga App 1, 9; 770 SE2d 22 (2015), and cases cited therein. This is

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[7] We also point out, as did Justice McCormack in her *IBM* dissent, that the member states' course of performance shows that unilateral amendments or withdrawals had long been accepted. As Justice McCormack noted, "member states did *not* view strict adherence to Articles III and IV as a binding contractual obligation, as Compact members have deviated from the Compact's election provision and apportionment formula without objection from other members." *IBM*, 496 Mich at 681-682 (McCormack, J., dissenting).

particularly so when considering Treasury's position on this issue over the past five years or so.

In any event, because the Compact is not binding, either as a contract or a compact, it is subject to Michigan law concerning the interpretation of statutes.

D. RETROACTIVITY AND THE DUE PROCESS CLAUSES

We hold, as did the trial court, 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.

In confronting these issues it is certainly worth repeating that "[s]tatutes are presumed to be constitutional, and this presumption is especially strong with respect to tax legislation. The party challenging the constitutionality of the statute has the burden of proving the law's invalidity." *Gen Motors Corp*, 290 Mich App at 369 (citations omitted). In *Gen Motors Corp* we noted that the Due Process Clause of the Fourteenth Amendment has been read by the Supreme Court to contain a substantive component even though the clause itself contains only a procedural component:

> The Fourteenth Amendment to the United States Constitution and Const 1963, art 1, § 17 guarantee that no state shall deprive any person of "life, liberty or property, without due process of law." Although textually only providing procedural protections, the Due Process Clause has a substantive component that protects individual liberty and property interests from arbitrary government actions. But to be protected by the Due Process Clause,

> a property interest must be a vested right. A vested right is an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice. [*Id*. at 370 (citations and quotation marks omitted).]

Both the federal courts and our state courts have uniformly held that the retroactive modification of tax statutes does not offend due process considerations as long as there is a legitimate legislative purpose that is furthered by a rational means. For example, in *Welch v Henry*, 305 US 134, 146-151; 59 S Ct 121; 83 L Ed 87 (1938), the United States Supreme Court rejected a due process challenge to a Wisconsin statute enacted in 1935 that imposed a tax on income received in 1933. The Supreme Court explained that "a tax is not necessarily unconstitutional because retroactive." *Id*. at 146. It further concluded:

> Taxation is neither a penalty imposed on the taxpayer nor a liability which he assumes by contract. It is but a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens. Since no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process, and to challenge the present tax it is not enough to point out that the taxable event, the receipt of income, antedated the statute. [*Id*. at 146-147.]

In order to resolve this issue, it is necessary "[i]n each case . . . to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." *Id*. at 147.

Carlton, 512 US 26, involved a due process challenge to the retroactive application of a 1987 amendment of a federal tax law to a taxpayer's transactions that occurred in 1986. The Supreme Court noted that it "repeatedly has upheld retroactive tax legislation against a due process challenge." *Carlton*, 512 US at 30. In addressing the "harsh and oppressive" language in *Welch*, the Court explained that "[t]he 'harsh and oppressive' formulation . . . does not differ from the prohibition against arbitrary and irrational legislation that applies generally to enactments in the sphere of economic policy." *Id*. (citation and quotation marks omitted). That is, if the retroactive application of a statute is supported by a legitimate legislative purpose that is furthered by rational means, then the wisdom of the legislation is a determination left *exclusively* to the legislative and executive branches. *Id*. at 30-31. Once the relatively easy two-part test is met, a court has no further business addressing any policy implications emanating from the statute.

Carlton makes clear that a taxpayer's reliance on a view of the law—even a correct view of the law—does not prevent the Legislature from retroactively amending a statute. In *Carlton*, the 1987 amendment was adopted as a curative measure because the tax provision adopted in 1986 failed to require that a decedent must have owned the stock in question in order for the decedent's estate to qualify for the deduction. *Id*. at 31. "As a result, any estate could claim the deduction simply by buying stock in the market and immediately reselling it to an [employee stock ownership plan (ESOP)], thereby obtaining a potentially dramatic reduction in (or even elimination of) the estate tax obligation." *Id*. Congress did not contemplate such a broad application of the deduction when it was originally enacted in 1986. *Id*. In rejecting the taxpayer's due process challenge to the retroactive application of the 1987 amendment, the Supreme Court reasoned:

> We conclude that the 1987 amendment's retroactive application meets the requirements of due process. First, Congress'[s] purpose in enacting the amendment was neither illegitimate nor arbitrary. Congress acted to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss. There is no plausible contention that Congress acted with an improper motive, as by targeting estate representatives such as Carlton after deliberately inducing them to engage in ESOP transactions. Congress, of course, might have chosen to make up the unanticipated revenue loss through general prospective taxation, but that choice would have burdened equally "innocent" taxpayers. Instead, it decided to prevent the loss by denying the deduction to those who had made purely tax-motivated stock transfers. We cannot say that its decision was unreasonable. [*Id*. at 32.]

The *Carlton* Court explained that Congress had acted promptly and established only a modest period of retroactivity. *Id*. The Court took note of the customary congressional practice of giving general revenue statutes effective dates that precede the dates of actual enactment, confined to short and limited periods related to the practicalities of producing national legislation. *Id*. at 32-33.

In *Carlton*, "the actual retroactive effect of the 1987 amendment extended for a period only slightly greater than one year." *Id*. at 33. Although it was uncontested that the taxpayer in *Carlton* had relied on the original 1986 version of the tax statute when engaging in stock transactions in December 1986, and the reading of the original statute on which the taxpayer relied appeared to have been correct, the taxpayer's reliance alone was insufficient to establish a due process violation. *Id*. "Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Id*. And, the 1987 amendment did not impose "a wholly new tax." *Id*. at 34 (quotation marks omitted). Because the retroactive application of the 1987 amendment was rationally related to a legitimate legislative purpose, the Court held that the amendment as applied to the taxpayer's 1986 transactions comported with due process. *Id*. at 35.

Michigan law is, of course, in accord. In *Detroit v Walker*, 445 Mich 682, 698; 520 NW2d 135 (1994), our Supreme Court noted that "[t]he concern regarding the retroactivity of statutes arises from constitutional due process principles that prevent retrospective laws from divesting rights to property or vested rights, or the impairment of contracts."

> A vested right has been defined as an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice. Nonetheless, when determining whether a right is vested, policy considerations, rather than inflexible definitions must control, and we must consider whether the holder possesses what amounts to be a title interest in the right asserted. [*Id*. at 699 (citations omitted).]

A vested right is a legal or equitable title to the present or future enjoyment of property, or to the present or future enforcement of a demand, or a legal exemption from a demand by another. *GMAC LLC v Dep't of Treasury*, 286 Mich App 365, 377; 781 NW2d 310 (2009). To be vested, a right must be more than a mere expectation based on an anticipated continuance of the present laws. *Id*. Relative to taxpayers, the *Walker* Court—just like the United States Supreme Court in *Carlton*—held that "it is also well established that a taxpayer does not have a vested right in a tax statute or in the continuance of any tax law." *Walker*, 445 Mich at 703. Not surprisingly, we have more recently held, consistently with *Walker*, that

> a vested right cannot be premised on an expectation that general laws will continue *and certainly cannot be premised on the continuation of tax law*. In light of the fact that plaintiffs did not have a vested right, the contention that due process rights were violated is simply without merit. [*GMAC*, 286 Mich App at 378.]

Likewise, in *Gen Motors Corp*, 290 Mich App at 371, we held that the plaintiff's "claim for a refund of use taxes it paid was not a vested right but rather a mere expectation that its claim might succeed in light of" an earlier decision of this Court. The plaintiff's "claim rest[ed] on the theory that it held a vested chose in action—its refund claim—and relies on cases involving rights of action for damages to property or personal injury." *Id*. But, this Court noted, the case before it involved a tax rather than a right of action, and the plaintiff, "as a taxpayer, does not have a vested right in a tax statute or in the continuance of any tax law." *Id*. This Court concluded that the Legislature had not acted illegitimately by enacting a statute for the purpose of reversing a decision of this Court because the statute did not reverse a judicial decision or repeal a final judgment. *Id*. at 372-373. Stating the obvious, we said that "it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted." *Id*., citing *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation."). "A legislature's action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a judicial decision—with retroactive legislation has almost universally been recognized as 'rationally related to a legitimate legislative purpose.'" *Gen Motors Corp*, 290 Mich App at 373, quoting *Carlton*, 512 US at 35.

In *Gen Motors Corp*, 290 Mich App at 376, the retroactive application of the statute did not exceed the "modesty limitation" of the Due Process Clause, as the statutory amendment did not reach back in time to assess a wholly new tax on long-concluded transactions. Rather, it confirmed a tax that had been assessed and paid for many years. *Id*. Quite similar to this case, the Legislature acted promptly in response to this Court's earlier decision by correcting what might have resulted in a significant loss of revenue. *Id*. This Court reasoned that "the nominal period to which the amendment retrospectively applies—five years—cannot be said to extend beyond the taxpayers' interest in finality and repose because the period of retroactivity is consistent with the applicable statute of limitations." *Id*. The period of retroactivity was "comparable to the time frames of other retroactive legislation that this Court, other state courts, and federal courts have held were within the modesty limits of the Due Process Clause." *Id*. at 377; see also *id*. at 377 n 3 (citing authorities in support of this proposition).

On the basis of the above authorities, we hold that the retroactive impact of 2014 PA 282 did not violate the Due Process Clauses of either the state or federal Constitutions. First, plaintiffs had no vested right in the tax laws or in the continuance of any tax laws. *Carlton*, 512 US at 33; *Walker*, 445 Mich at 703; *GMAC*, 286 Mich App at 378. Indeed, plaintiffs attempt to characterize their tax refund claims as causes of action that comprised vested interests, but that same argument was considered and rejected in *Gen Motors Corp*, 290 Mich App at 371. Plaintiffs did not have a vested interest protected by the Due Process Clause in the continuation of the Compact's apportionment provision.

Further, caselaw supports the proposition that the Legislature had a legitimate purpose for giving retroactive effect to 2014 PA 282. As the trial court explained, a Senate Fiscal Agency analysis of SB 156 addressed the potential ramifications of failing to accord retroactive effect to 2014 PA 282:[8]

> The first enacting section of the bill would retroactively repeal the State's enactment of the Multistate Tax Compact, effective January 1, 2008. As a result, taxpayers filing

[8] Legislative bill analyses can be probative in determining the historical background leading up to the introduction of legislation, though we do not look to them for official statements of legislative intent. See *North Ottawa Community Hosp v Kieft*, 457 Mich 394, 406 n 12; 578 NW2d 267 (1998); *Kelly Servs, Inc v Dep't of Treasury*, 296 Mich App 306, 317-318; 818 NW2d 482 (2012).

> under the MBT would not be allowed to use alternative apportionment calculations provided under the Compact when computing a Michigan tax base. While the Department of Treasury has not allowed taxpayers to use these alternative calculations, the Michigan Supreme Court's recent decision in *IBM Corp. v Department of Treasury* may enable certain taxpayers to use these calculations, and the Department estimates that approximately $1.1 billion in refunds would be paid as a result. Because MBT revenue is directed to the General Fund, these refunds would reduce General Fund revenue, and *the bill would prevent a reduction in General Fund revenue of $1.1 billion*. [Senate Legislative Analysis, SB 156, September 10, 2014, p 5 (emphasis added).]

It is legitimate legislative action to both (1) correct a perceived misinterpretation of a statute, and (2) eliminate a significant revenue loss resulting from that misinterpretation. See *Carlton*, 512 US at 32 (finding a legitimate legislative purpose for the retroactive application of tax legislation meant to correct what Congress reasonably viewed as a mistake in earlier legislation "that would have created a significant and unanticipated revenue loss"), and *Gen Motors Corp*, 290 Mich App at 373 (noting that "it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted," and that "[a] legislature's action to mend a leak in the public treasury or tax revenue—whether created by poor drafting of legislation in the first instance or by a judicial decision—with retroactive legislation has almost universally been recognized as rationally related to a legitimate legislative purpose") (quotation marks and citation omitted). Accordingly, the retroactive application of 2014 PA 282 served a legitimate governmental purpose.

The retroactive application of 2014 PA 282 was likewise a rational means to further these legitimate purposes. Four factors are relevant in this determination. First, like the statutes in *Carlton* and *Gen Motors Corp*, 2014 PA 282 "does not reach back in time to assess a 'wholly new tax' on long-concluded transactions." *Gen Motors Corp*, 290 Mich App at 376. Rather, 2014 PA 282 clarifies the method of apportioning the tax base for a previously enacted tax, the MBT, by confirming that the single-factor apportionment method must be utilized and that the three-factor method may not be elected. Second, plaintiffs, as a matter of law, could not have relied on the availability of the three-factor apportionment method. As discussed, taxpayers do "not have a vested right in a tax statute or in the continuance of any tax law," *Walker*, 445 Mich at 703, and states have wide latitude in the selection of apportionment methodologies, *Moorman*, 437 US at 274. And a taxpayer's reliance on a particular tax law is insufficient to establish a due process violation because "[t]ax legislation is not a promise, and a taxpayer has no vested right in" a tax statute. *Carlton*, 512 US at 33. And, factually, plaintiffs either were—or should have been—aware that the state (through Treasury) had been arguing since at least 2011 (and even then relative to the 2008-2009 tax years) that the apportionment provision in the Compact was no longer available. See *Int'l Business Machines Corp v Dep't of Treasury*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No 306618), rev'd by *IBM*, 496 Mich 642.

Third, there is no doubt that the Legislature acted promptly to correct the error. As the trial court found, "[n]ot until July 14, 2014, when the [Supreme] Court decided *IBM*, was it made clear to the Legislature that 2007 PA 36 was defective. SB 156, H-1, which added the retroactive repeal of the Compact[] provisions, was introduced on September 9, 2014, and was enacted into law on September 11, 2014." Fourth, the 61/2-year retroactive period was sufficiently modest relative to the time frames of other retroactive legislation that have been upheld by Michigan courts, federal courts, and other state courts. See *Gen Motors Corp*, 290 Mich App at 376-377 (upholding a five-year retroactive application), and at 377 n 3 (citing caselaw from Michigan and other jurisdictions approving similar retroactive periods); *GMAC*, 286 Mich App at 378 (affirming a seven-year retroactive period). These factors squarely lead to the conclusion that the retroactive application of 2014 PA 282 was a rational means of furthering legitimate governmental purposes.

Some plaintiffs rely on *Newsweek, Inc v Florida Dep't of Revenue*, 522 US 442; 118 S Ct 904; 139 L Ed 2d 888 (1998), contending that Michigan engaged in a "bait and switch" by enticing foreign companies to engage in commerce in Michigan by providing the three-factor apportionment formula and then retroactively taking away this apportionment method. But reliance on *Newsweek* is misplaced. In *Newsweek*, 522 US at 444, the Supreme Court held that a state could not engage in a "bait and switch" by holding out what appeared to be a clear and certain remedy, i.e., a tax appeal that could be pursued after paying disputed taxes, and then later declare that no such remedy exists. (Quotation marks omitted.) Here, however, Michigan has not taken away any procedure for seeking a refund, nor has any procedural remedy been denied. Instead, the Michigan Legislature has done what legislatures across the country have had to do—clarify through statutory amendment the intended meaning of a statutory provision that had been misread by the courts. Further, Michigan never engaged in a "bait and switch" because it never suggested that the three-factor method of apportionment under the Compact could not be altered. To the contrary, the Compact expressly indicated a member state *could unilaterally* get out of the Compact at any time, and as we just emphasized, Michigan has consistently maintained that the three-factor apportionment method could not be used under the MBT Act, as reflected in the litigation in *IBM*, 496 Mich 642.[9] The retroactive provisions of 2014 PA 282 were not enacted in violation of the state or federal Due Process Clauses.

Plaintiffs also argue that retroactive withdrawal from the Compact is prohibited by 1969 PA 343, art X(2),[10] which states that a party state may, by enacting a statute, withdraw from the Compact but that "[n]o withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal." According to plaintiffs, retroactive withdrawal is nonsensical because Michigan *participated* under the Compact in the period from 2008 through 2010 by paying dues, voting, participating in Commission leadership and meetings, and exchanging confidential taxpayer information. However, plaintiffs

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[9] Some plaintiffs suggest that the retroactive application of 2014 PA 282 violates Michigan caselaw setting forth rules regarding retrospective legislation. This unpreserved argument fails because plaintiffs lacked a vested interest in the continuance of tax laws and in a tax refund based on the continuation of the Compact election provisions.

[10] See also former MCL 205.581, art X(2).

have failed to provide any authority establishing the relevancy of such evidence, and since the statutory and constitutional issues raised are legal issues, *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009) ("We review de novo questions of law involving statutory interpretation and questions concerning the constitutionality of a statute."), we fail to see how Michigan's participation in the Commission impacts the legal import of the statute. Accordingly, we are unconvinced by plaintiffs' contention that Michigan's alleged participation in the Commission during the relevant time frame affects the question whether 2014 PA 282 retroactively repealed the Compact provisions.

E. SEPARATION OF POWERS

We now turn our attention to the argument that retroactive application of 2014 PA 282 violates the Separation of Powers Clause of the Michigan Constitution. Const 1963, art 3, § 2 states:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

"The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. "Simply put, legislative power is the power to make laws. By contrast, a defining aspect of judicial power is the interpretation of law." *People v Konopka (On Remand)*, 309 Mich App 345, 361; 869 NW2d 651 (2015) (quotation marks and citation omitted).

There is little doubt that the Legislature lacks authority to reverse a judicial decision or to repeal a final judgment, *Wylie v Grand Rapids City Comm*, 293 Mich 571, 582; 292 NW 668 (1940); *Gen Motors Corp*, 290 Mich App at 372-373, but there is also little doubt that it has the authority—if not the obligation—to amend a statute that it believes has been misconstrued by the judiciary, *Romein v Gen Motors Corp*, 436 Mich 515, 537; 462 NW2d 555 (1990), aff'd 503 US 181 (1992); see also *Gen Motors Corp*, 290 Mich App at 373 (stating that "it is legitimate for the Legislature to amend a law that it believes the judiciary has wrongly interpreted"). This power to amend includes the power to retroactively correct the judiciary's misinterpretation of legislation:

> [The Legislature possesses the] authority to retroactively amend legislation perceived to have been misconstrued by the judiciary. Such retroactive amendments based on prior judicial decisions are constitutional if the statute comports with the requirements of the Contract and Due Process Clauses of the federal and state constitutions, and *so long as the retroactive provisions of the statute do not impair final judgments*.
>
> Numerous courts have recognized that the Legislature may cure the judicial misinterpretation of a statute. For instance, the federal courts have upheld statutes that retroactively abrogate statutory rights, at least where the repealing statute does not impair final judgments. In *Seese v Bethlehem Steel Co*, 168 F2d 58, 62 (CA 4, 1948), the court reasoned that the Legislature's enactment of a retroactive statute repealing the effects of a prior judicial decision is not an exercise of judicial power[.] [*Romein*, 436

> Mich at 537 (emphasis altered; citation omitted).]

See also *Konopka*, 309 Mich App at 361-365 (finding no separation of powers violation where the Legislature retroactively amended a statute that was perceived to have been misconstrued by the judiciary); *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.").

There are several reasons why the Legislature did not violate the Separation of Powers Clause by retroactively repealing the Compact to January 1, 2008, thereby obviating the *IBM* Court's legal conclusions. First, 2014 PA 282 did not reverse a judicial decision or repeal a final judgment. In *IBM*, 496 Mich at 645, 658-659, 662 (opinion by VIVIANO, J.), the lead opinion held that *2007 PA 36* did not implicitly repeal the Compact's election provision. 2014 PA 282 did not overturn that judicial interpretation of the 2007 law. Instead, the Legislature created a new law, not interpreted by the *IBM* Court, that explicitly repealed the Compact provisions effective January 1, 2008, to further what the Legislature understood to have been its original intent when it enacted 2007 PA 36. This did not impinge on the judiciary's role of interpreting the law but instead corrected a mistake that was made clear by the holding in *IBM*. That is, the Legislature in 2014 PA 282 *explicitly* repealed the Compact provisions after the holding in *IBM* revealed that the Compact election provision had not been *implicitly* repealed by the enactment of 2007 PA 36. Although 2014 PA 282 may have rendered moot the effect of the judicial interpretation in *IBM*, this did not overturn that Court's judgment and did not violate the

Separation of Powers Clause. See *Romein*, 436 Mich at 537 (citing with approval a federal case "reason[ing] that the Legislature's enactment of a retroactive statute repealing *the effects of a prior judicial decision* is not an exercise of judicial power"); *GMAC*, 286 Mich App at 380 ("[I]t is the province of the Legislature to acquiesce in the judicial interpretation of a statute or to amend the legislation to obviate a judicial interpretation.").

Some plaintiffs cite *Presque Isle Twp Bd of Ed v Presque Isle Co Bd of Ed*, 364 Mich 605, 612; 111 NW2d 853 (1961), for the proposition that a legislative body may not declare what its intention was on a former occasion such that it would affect past transactions. Although *Presque Isle* cited a Wisconsin case[11] that contained this language, the actual holding in *Presque Isle* was the unremarkable proposition that one legislator's present recollection of what he intended when a bill was passed could not be received in evidence for use in interpreting a statute. *Id*. The holding in *Presque Isle* is inapplicable to this issue.[12]

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[11] *Northern Trust Co v Snyder*, 113 Wis 516; 89 NW 460 (1902).

[12] Plaintiffs also contend that the 2014 Legislature could not declare the intent of the Legislature in 2007 because only 15% of the members of the 2014 Legislature were members of the 2007 Legislature. We have been presented with no authority stating that the composition of the Legislature affects whether it may clarify its original intent in enacting a prior law, *Hover v Chrysler Corp*, 209 Mich App 314, 319; 530 NW2d 96 (1995) (stating that a party may not leave it to the Court to search for authority to sustain or reject the party's position), and cannot square that purported rule with the overwhelming caselaw recognizing the Legislature's power to correct what it perceives to be an incorrect interpretation of a statute.

Finally, plaintiffs proclaim that they are entitled to the benefit of the *IBM* Court's ruling as to the effect of 2007 PA 36. They are wrong. Instead, it is well-settled that our duty as an appellate court is to apply the most recent legislative pronouncement on an issue pending before this Court when the Legislature makes the new law or amendment retroactive. As stated by the United States Supreme Court:

> It is true, as petitioners contend, that Congress can always revise the judgments of Article III courts in one sense: When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly. . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must "decide according to existing laws." Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was. [*Plout v Spendthrift Farm, Inc*, 514 US 211, 226-227; 115 S Ct 1447; 131 L Ed 2d 328 (1995) (citations omitted).]

2014 PA 282 did not declare what the law was as to any final judgment, as each of these cases was pending[13] when the statute was passed. In other words, none of these cases had a judgment that was “frozen,” *King v McPherson Hosp*, 290 Mich App 299, 306; 810 NW2d 594 (2010) (quotation marks and citations omitted), and so it was constitutionally permissible to apply 2014 PA 282 to these pending cases.

For all these reasons, we hold that the Legislature did not violate the Separation of Powers Clause of the state Constitution when it enacted 2014 PA 282.

F. COMMERCE CLAUSE

We next turn to plaintiff’s argument that 2014 PA 282 violates the Commerce Clause of the United States Constitution.

The Commerce Clause, US Const, art I, § 8, provides: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .” Although the Commerce Clause says nothing about the protection of interstate commerce in the absence of any action by Congress, the Supreme Court has greatly expanded this Clause to include “a negative sweep” by “prohibit[ing] certain state actions that interfere with interstate commerce.” *Quill Corp v North Dakota*, 504 US 298, 309; 112 S Ct 1904; 119 L Ed 2d 91 (1992). According to the Court, the Commerce “Clause prohibits discrimination against interstate commerce and bars state regulations that unduly

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[13] Although International Business Machines is a party to these appeals, its tax appeal from the 2008 tax year—the tax year subject to the Supreme Court’s 2014 *IBM* decision, is not at issue here.

burden interstate commerce." *Id*. at 312 (citations omitted).

> The United States Supreme Court . . . has established a four-pronged test to determine whether a state tax violates the Commerce Clause. *Complete Auto Transit, Inc v Brady*, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977). A state tax will withstand scrutiny under a Commerce Clause challenge and will be held to be constitutionally valid under the four-pronged test articulated in *Complete Auto* provided that the tax: (1) is applied to an activity having a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the state. [*Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 415; 488 NW2d 182 (1992).]

Only the third prong is challenged in this case; plaintiffs contend that 2014 PA 282 discriminates against interstate commerce. "A tax violates the third prong of the *Complete Auto* test if it is facially discriminatory, has a discriminatory purpose, *or* has the effect of unduly burdening interstate commerce." *Caterpillar*, 440 Mich at 422, citing *Amerada Hess Corp v New Jersey Dep't of Treasury*, 490 US 66, 75; 109 S Ct 1617; 104 L Ed 2d 58 (1989).

We hold that 2014 PA 282 does not discriminate against or unduly burden interstate commerce. First, 2014 PA 282 is not facially discriminatory. A tax statute is facially discriminatory if there is "an explicit discriminatory design to the tax." *Amerada Hess*, 490 US at 76. 2014 PA 282 does not, on its face, create any classification based on a taxpayer's state of origin or the location of commerce. Rather, it repeals the Compact and eliminates the provision allowing election of a three-factor apportionment formula for *all* taxpayers, both in-state and out-of-state companies. Therefore, 2014 PA 282 does not reflect an explicit discriminatory design, and no facial discrimination occurred.

Second, 2014 PA 282 does not have a discriminatory purpose. A discriminatory purpose may be found, for example, where a tax statute "was motivated by an intent to confer a benefit upon local industry not granted to out-of-state industry . . . ." *Amerada Hess*, 490 US at 76. 2014 PA 282 states that it was enacted to express the original intent of the Legislature to eliminate the election provision for purposes of the MBT Act and the Income Tax Act, as well as to protect state revenues. Senate Legislative Analysis, SB 156, September 10, 2014, pp 3-5. There is no evidence of a legislative intent to give a benefit to local industry that is denied to out-of-state businesses. Indeed, 2014 PA 282 puts in- and out-of-state corporate taxpayers *in the same position* relative to Michigan tax calculations.

There is a contention by some that a discriminatory purpose is reflected in comments made by certain legislators to the media, but as we have said, statements of individual legislators generally do not comprise proper evidence of legislative intent. See *Chmielewski v Xermac, Inc*, 457 Mich 593, 609 n 18; 580 NW2d 817 (1998); *Detroit Pub Sch Bd of Ed v Romulus Community Sch Bd of Ed*, 227 Mich App 80, 89 n 4; 575 NW2d 90 (1997); *Williamston v Wheatfield Twp*, 142 Mich App 714, 719; 370 NW2d 325 (1985), citing *Presque Isle*, 364 Mich at 612. Plaintiffs identify no caselaw permitting consideration of the statements of individual legislators, particularly statements made to the media, to establish legislative intent. And in any event, the purported media comments of the legislators do not reveal any intent to discriminate against interstate commerce but, instead, are reasonably understood to reflect a desire to ensure a *level playing field* and to avoid giving an unfair advantage to out-of-state businesses. There is no evidence of a discriminatory purpose underlying the enactment of 2014 PA 282.

Third, 2014 PA 282 does not have a discriminatory effect, as it merely precludes both in-state and out-of-state taxpayers from electing the three-factor apportionment formula previously available under the Compact. The federal Constitution does not require the use of a particular apportionment formula, and a single-factor formula is presumptively valid. See *Moorman*, 437 US at 273, which provides a good example. In *Moorman*, the Supreme Court rejected a Commerce Clause challenge to Iowa's use of a single-factor formula; the Court did not agree with the argument that Iowa's single-factor formula was responsible for an alleged duplication of taxation with Illinois, which used a three-factor formula. *Id*. at 276-281. The Court held that, in the absence of implementing legislation from Congress, the Commerce Clause did not require Iowa to compute net income under Illinois's three-factor formula. *Id*. at 277-278. The Court reasoned in part that any disparity in the tax treatment of Iowa and Illinois companies was "not attributable to the Iowa statute. It treats both local and foreign concerns with an even hand; the alleged disparity can only be the consequence of the combined effect of the Iowa *and* Illinois statutes, and Iowa is not responsible for the latter." *Id*. at 277 n 12. The purported "discrimination" against interstate commerce was "simply a way of describing the potential consequences of the use of different formulas by the two States. These consequences, however, could be avoided by the adoption of any uniform rule; the 'discrimination' does not inhere in either State's formula." *Id*.

Plaintiffs have not established that application of the single-factor formula required by 2014 PA 282 discriminatorily affects out-of-state companies. As noted, the single-factor formula applies to *all* taxpayers, both Michigan and out-of-state companies. As with the Iowa statute in *Moorman*, 2014 PA 282 treats local and foreign companies with an equal hand by requiring the single-factor formula for both. Any purported discrimination against interstate commerce is, in truth, "simply a way of describing the potential consequences of the use of different formulas by" Michigan and other states. *Moorman*, 437 US at 277 n 12. Such "consequences, however, could be avoided by the adoption of any uniform rule; the 'discrimination' does not inhere in" the apportionment formula used by Michigan or by other states. *Id*. Plaintiffs have not established that Michigan's single-factor formula discriminates against interstate commerce. 2014 PA 282 does not violate the Commerce Clause.

G. THE FIRST AMENDMENT

Moving on to the next argument, we conclude that plaintiffs were not denied the right to petition the government under the First Amendment of the federal Constitution or the analogous Michigan provision.

"The right of citizens to petition their government for redress of grievances is specifically guaranteed by the United States and Michigan Constitutions."

Jackson Co Ed Ass'n v Grass Lake Community Sch Bd of Ed, 95 Mich App 635, 641; 291 NW2d 53 (1979), citing US Const, Am I, and Const 1963, art 1, § 3. But this right "may be circumscribed to the extent necessary to achieve a valid state objective." *Jackson Co Ed* Ass'n, 95 Mich App at 642. The right to petition extends to all departments of the government and includes the right of access to the courts. *California Motor Transp Co v Trucking Unlimited*, 404 US 508, 510; 92 S Ct 609; 30 L Ed 2d 642 (1972). See also *In re ALZ*, 247 Mich App 264, 276; 636 NW2d 284 (2001) (noting that the *Cal Motor Transp* Court "found a constitutional basis for the right of access to the courts as an aspect of the First Amendment right of petition"); *Mayor of Lansing v Knights of the Ku Klux Klan (After Remand)*, 222 Mich App 637, 647; 564 NW2d 177 (1997) ("The First Amendment right to petition the government has been construed to implicate the right of access to courts for redress of wrongs.").

However, the First Amendment right to advocate does not guarantee that the speech will persuade or that the advocacy will be effective. *Smith v Arkansas State Hwy Employees, Local 1315*, 441 US 463, 464-465; 99 S Ct 1826; 60 L Ed 2d 360 (1979). That is, "the First Amendment does not impose any affirmative obligation on the government to listen" or respond to the speaker. *Id*. at 465. "Nothing in the First Amendment or in [the United States Supreme] Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Minnesota State Bd for Community Colleges v Knight*, 465 US 271, 285; 104 S Ct 1058; 79 L Ed 2d 299 (1984). See also *We The People Foundation, Inc v United States*, 376 US App DC 117, 120; 485 F3d 140 (2007) (rejecting the plaintiffs' contention "that they have a right under the First Amendment to receive a government response to or official consideration of a petition for a redress of grievances").

Further, legislative retraction of the only remedy available to a decision-maker is different from interference with the plaintiffs' abilities to express their views to the decision-maker. Thus, such a retraction does not violate the right to petition the government. *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of the Office of Fin & Ins Regulation*, 287 Mich App 326, 336; 788 NW2d 842 (2010) (finding no denial of lenders' right of access to courts in a 42 USC 1983 case, stating that "[p]laintiff cannot claim that a violation of 42 USC 1983 occurred simply because a newly enacted statute precluded recovery of certain damages that plaintiff's members had become accustomed to receiving in [nonsufficient funds] cases"). Accord: *American Bus Ass'n v Rogoff*, 396 US App DC 353, 360; 649 F3d 734 (2011).

Plaintiffs assert that, in rejecting their argument, the trial court erred in relying on cases addressing the right to be heard by the Legislature; plaintiffs say they are instead contending that they were "thrown out of court." As a result of the enactment of 2014 PA 282, plaintiffs contend that they have been denied the right to petition Treasury and to appeal to a court for a refund of taxes already paid. Plaintiffs characterize this as a classic denial of the right to petition and rely on *Flagg v Detroit*, 715 F3d 165, 174 (CA 6, 2013), to argue that they have established the elements necessary to establish a denial of access to the courts.

In *Flagg*, the court observed that the United States "Supreme Court has recognized a constitutional right of access to the courts, whereby a plaintiff with a nonfrivolous legal claim has the right to bring that claim to a court of law." *Id*. at 173, citing *Christopher v Harbury*, 536 US 403, 415 n 12; 122 S Ct 2179; 153 L Ed 2d 413 (2002). The right to access the courts does not create substantive rights; a plaintiff claiming a denial of access "must have an arguable, nonfrivolous underlying cause of action." *Flagg*, 715 F3d at 173. The *Flagg* court explained:

> Denial of access to the courts claims may be forward-looking or backward-looking. In forward-looking claims, the plaintiff accuses the government of creating or maintaining some frustrating condition that stands between the plaintiff and the courthouse door. The object of the suit is to eliminate the condition, thereby allowing the plaintiff, usually an inmate, to sue on some underlying legal claim. In backward-looking claims, such as those at issue in the instant case, the government is accused of barring the courthouse door by concealing or destroying evidence so that the plaintiff is unable to ever obtain an adequate remedy on the underlying claim. Backward-looking claims are much less established than forward-looking claims, but this Court has recognized them and the Supreme Court has provided additional guidance as to the elements of a viable backward-looking claim. [*Id*. (citations and quotation marks omitted).]

Relying on *Christopher*, 536 US 403, and *Swekel v City of River Rouge*, 119 F3d 1259 (CA 6, 1997), the *Flagg* court identified the "elements of a backward-looking denial of access claim: (1) a non-frivolous underlying claim; (2) obstructive actions by state actors;

(3) substantial[] prejudice to the underlying claim that cannot be remedied by the state court; and (4) a request for relief which the plaintiff would have sought on the underlying claim and is now otherwise unattainable." *Flagg*, 715 F3d at 174 (citations and quotation marks omitted; alteration in original).

Plaintiffs cannot establish the second element identified in *Flagg* for a backward-looking denial-of-access claim, as there are no obstructive actions by state actors. Although plaintiffs contend that enactment of 2014 PA 282 obstructed plaintiffs' access to the courts by retroactively destroying their right to elect the three-factor apportionment formula under the Compact and preventing them from obtaining a larger tax refund, *Flagg* itself indicates that a backward-looking denial of access claim can only prevail when "the government is accused of barring the courthouse door *by concealing or destroying evidence* . . . ." *Flagg*, 715 F3d at 173 (emphasis added). There is no allegation in these cases that Treasury or any state actor has concealed or destroyed evidence. The enactment of 2014 PA 282, which retroactively repealed the Compact and required the use of a single-factor apportionment formula, did not deny plaintiffs access to the courts. In fact, as is obvious, this very litigation demonstrates that plaintiffs have had an ample opportunity to present their arguments to the courts.[14] Legislative elimination of the right to elect the three-factor apportionment formula, and any refund on the basis of such an election, does not interfere with plaintiffs' abilities to file claims or seek refunds from the courts or Treasury. All that they

[14] Like any other citizen, the First Amendment gave plaintiffs the ability to voice any objection to the Legislature or Governor before 2014 PA 282 was passed and signed into law.

have been prohibited from doing is seeking a refund under one particular formula. This does not violate the First Amendment. See *American Bus Ass'n*, 396 US App DC at 360; *Mich Deferred Presentment Servs Ass'n, Inc*, 287 Mich App at 336.

H. MISCELLANEOUS STATE CONSTITUTIONAL PROVISIONS

Despite plaintiffs' protests to the contrary, the enactment of 2014 PA 282 did not violate the Title-Object Clause, the Five-Day Rule, or the Distinct-Statement Clause of the Michigan Constitution.

1. TITLE-OBJECT

Const 1963, art 4, § 24 provides:

> No law shall embrace more than one object, which shall be expressed in its title. No bill shall be altered or amended on its passage through either house so as to change its original purpose as determined by its total content and not alone by its title.

2014 PA 282 contains the following title:

> AN ACT to amend 2007 PA 36, entitled "An act to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, reporting, payment, and enforcement of taxes on certain commercial, business, and financial activities; to prescribe the powers and duties of public officers and state departments; to provide for the inspection of certain taxpayer records; to provide for interest and penalties; to provide exemptions, credits, and refunds; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and

> to make appropriations," by amending sections 111, 305, 403, and 433 (MCL 208.1111, 208.1305, 208.1403, and 208.1433), sections 111 and 305 as amended by 2012 PA 605, section 403 as amended by 2008 PA 434, and section 433 as amended by 2007 PA 215, and by adding section 508; and to repeal acts and parts of acts.

This Court has explained:

> When assessing a title-object challenge to the constitutionality of a statute, all possible presumptions should be afforded to find constitutionality. An amended title should be construed reasonably, not narrowly and with unnecessary technicality. The goal of the Title-Object Clause is notice, not restriction, of legislation, and it is only violated where the subjects are so diverse in nature that they have no necessary connection. The purpose of the clause is to prevent the Legislature from passing laws not fully understood, and to ensure that both the legislators and the public have proper notice of legislative content and to prevent deceit and subterfuge. [*Lawnichak v Dep't of Treasury*, 214 Mich App 618, 620 621; 543 NW2d 359 (1995) (citations omitted).]

Three types of challenges may be asserted under the Title-Object Clause:

> (1) a "title-body" challenge, which indicates that the body exceeds the scope of the title, (2) a "multiple-object challenge," which indicates that the body embraces more than one object, and (3) a "change of purpose

> challenge," which indicates that the subject matter of the amendment is not germane to the original purpose. [*Wayne Co Bd of Comm'rs v Wayne Co Airport Auth*, 253 Mich App 144, 185; 658 NW2d 804 (2002).]

All three types of challenges have been raised in these cases.

We agree with the trial court that plaintiffs' multiple-objects challenge is devoid of merit. "The body of the law, and not just its title, must be examined to determine whether the act embraces more than one object. The purpose of the single-object rule is to avoid bringing into one bill diverse subjects that have no necessary connection." *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 557; 595 NW2d 176 (1999) (citations and quotation marks omitted). "The object of the legislation must be determined by examining the law as enacted, not as originally introduced." *People v Kevorkian*, 447 Mich 436, 456; 527 NW2d 714 (1994) (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.). "The object of a law is defined as its general purpose or aim. The constitutional requirement should be construed reasonably and permits a bill enacted into law to include all matters germane to its object, as well as all provisions that directly relate to, carry out, and implement the principal object." *Gen Motors Corp*, 290 Mich App at 388 (citations and quotation marks omitted). "Legislation should not be invalidated merely because it contains more than one means of attaining its primary object." *City of Livonia v Dep't of Social Servs*, 423 Mich 466, 499; 378 NW2d 402 (1985). "The Legislature may enact new legislation or amend any act to which the subject of the new legislation is germane, auxiliary, or incidental. A statute may authorize the doing of all things that are in furtherance of the general purpose of the act without violating the one-object limitation of art 4, § 24." *Mooahesh v Dep't of Treasury*, 195 Mich App 551, 564; 492 NW2d 246 (1992) (citations and quotation marks omitted), overruled in part on other grounds by *Silverman v Univ of Mich Bd of Regents*, 445 Mich 209 (1994), overruled in part on other grounds by *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763 (2003).

In *Mooahesh*, this Court quoted from a prior opinion of this Court that summarized the single-object requirement in a case concerning the repeal of a tax:

> It might have been better draftsmanship to have placed the provision concerning the taxability of municipal transportation utilities in the general property tax law (where one might expect to find it) rather than in the home rule act. There is, however, no constitutional requirement that the legislature do a tidy job in legislating. It is perfectly free to enact bits and pieces of legislation in separate acts or to tack them on to existing statutes even though some persons might think that the bits and pieces belong in a particular general statute covering the matter. *The constitutional requirement is satisfied if the bits and pieces so enacted are embraced in the object expressed in the title of the amendatory act and the act being amended*. [*Mooahesh*, 195 Mich App at 564, quoting *Detroit Bd of Street R Comm'rs v Wayne Co*, 18 Mich App 614, 622-623; 171 NW2d 669 (1969).]

The trial court in *Mooahesh* found that 1988 PA 516, which amended the Income Tax Act to provide that lottery winnings are taxable, violated the Title-Object Clause because it repealed a section of the Lottery Act containing a tax exemption for lottery winnings, which the trial court viewed as an object distinct from the general object of raising revenue. *Mooahesh*, 195 Mich App at 562. This Court reversed that determination, noting that the object of 1988 PA 516 was to raise revenue, *id*. at 565, and that "[t]he object of such an act is necessarily broad-ranging and comprehensive." *Id*. at 566 (citation and quotation marks omitted).

> Revenues can be raised in any number of ways, as history has made obvious. Taxes may be imposed, increased, or rearranged. The object of meet[ing] deficiencies in state funds may reasonably be found to include the repeal of a tax exemption, even if that exemption does not appear in any act specifically devoted to taxation. While it might have been better draftsmanship to have provided for a separate amendment to the Lottery Act, the inclusion of the repeal of the tax exemption provision in an act amending the income tax laws does not render the act in violation of the single-object requirement. [*Id*. (citations and quotation marks omitted; alteration in original).]

In rejecting plaintiffs' multiple-objects challenge in the present cases, the trial court discussed *Mooahesh* and reasoned as follows:

> Just as the statute considered in *Mooahesh* had as its general purpose the raising of revenues, so too was the general purpose of [2014] PA 282. And just as it might have been

> "better draftsmanship" to have provided for a separate amendment repealing § 34 of the Lottery Act, the Legislature in enacting [2014] PA 282 might have been better advised to repeal the Compact provisions in a separate act. But like the choice to amend the [Income Tax Act] and repeal a section of the Lottery Act in one act, the choice to include the repeal of the Compact and amend the MBT in one act is not a violation of the single-object requirement.

The trial court's analysis is convincing. The single object, i.e., the general purpose or aim, of 2014 PA 282 is to amend 2007 PA 36, the MBT Act. This general object was accomplished by amending provisions of the MBT Act and by repealing the Compact. This object is reflected in the title of 2014 PA 282, which refers to the amendment of certain sections of 2007 PA 36 and the repeal of acts and parts of acts. Enacting § 1 of 2014 PA 282 provides that the Compact is repealed retroactive to January 1, 2008, and provides that the repeal is intended to express the original intent of the Legislature regarding the application of a section of the MBT Act and to eliminate the apportionment election provision in the Compact. This enacting section thus clarifies that the repeal of the Compact and the concomitant elimination of the apportionment election provision is germane to the object of amending the MBT Act in that it clarifies the appropriate method of apportionment. In other words, the Compact and the MBT Act are related to one another because they each pertain to the method of apportioning the tax base. Thus, 2014 PA 282 does not contain diverse subjects that have no necessary connection. Rather, the repeal of the Compact directly relates to, carries out, and implements the principal object of amending the MBT Act.

"With regard to a title-body challenge, this Court has indicated that the title of an act must express the general purpose or object of the act." *Wayne Co Bd of Comm'rs*, 253 Mich App at 185. "Only the general object and not all the details and incidents of a statute need be indicated in the title." *Ace Tex Corp v Detroit*, 185 Mich App 609, 616; 463 NW2d 166 (1990).

> [I]t is not necessary that a title be an index of all of an act's provisions. It is sufficient that the act centers to one main general object or purpose which the title comprehensively declares, though in general terms, and if provisions in the body of the act not directly mentioned in the title are germane, auxiliary, or incidental to that general purpose[.] [*City of Livonia*, 423 Mich at 501 (citations and quotation marks omitted).]

"Whether a provision is germane to its purpose depends upon its relationship to the object of the act." *Ace Tex Corp*, 185 Mich App at 616. "The test is whether the title gives fair notice to the legislators and the public of the challenged provision. The notice aspect is violated where the subjects are so diverse in nature that they have no necessary connection." *H J Tucker & Assoc, Inc*, 234 Mich App at 559 (citations and quotation marks omitted).

Again, the title of 2014 PA 282 expresses the general purpose or object of amending the MBT Act and refers to the repeal of acts or parts of acts. Although the title does not use the word "Compact," the title need not be an index of all of the act's provisions. *City of Livonia*, 423 Mich at 501. The repeal of the Compact is germane, auxiliary, or incidental to the amendment of the MBT Act because the elimination of the Compact's election provision is pertinent to the proper method of apportionment of the MBT tax base. The subjects are not so diverse in nature that they lack a necessary connection, and neither the legislators nor the public were deprived of notice of the challenged provision. See also *Mooahesh*, 195 Mich App at 569 ("Despite [1988 PA 516's] failure to state explicitly in the title that the Lottery Act exemption was being repealed, we are able to declare that the subjects are not so diverse as to have 'no necessary connection.'").

When confronting a change-of-purpose challenge, a court must consider whether the change comprises a mere amendment or extension of the basic purpose of the original bill or instead introduces an entirely new and different subject matter. *Anderson v Oakland Co Clerk*, 419 Mich 313, 328; 353 NW2d 448 (1984). "[T]he test for determining if an amendment or substitute changes a purpose of the bill is whether the subject matter of the amendment or substitute is germane to the original purpose. The test of germaneness is much like the standard for determining whether a bill is limited to a single object." *Kevorkian*, 447 Mich at 461 (opinion by CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.) (citations omitted). In *Kevorkian*, *id*. at 451-452, the bill as introduced would have created a commission on death and dying to study "'voluntary self-termination of life,'" but the amended bill that became law added criminal penalties for assisting another person in committing suicide. Our Supreme Court rejected a change-of-purpose challenge because the criminal penalties were an interim measure that provided a stable environment while the commission, the Legislature, and the citizenry studied the matter further. *Id*. at 461; *id*. at 497 (BOYLE, J., concurring in part); *id*. at 511-512 (LEVIN, J., concurring in part); *id*. at 524 (MALLETT, J., concurring in part).

With respect to 2014 PA 282, both the original and amended bill contained provisions related to the MBT tax base. The original purpose of SB 156 was to amend the MBT Act in various ways, including by enacting amendments concerning the gross-receipts tax base under the MBT. The change implemented by substitute H-1, as enrolled as 2014 PA 282, did not introduce an entirely new and different subject matter. Instead, it amended or extended the basic purpose of the original bill by retaining the original amendments and adding other provisions, including language retroactively repealing the Compact provisions and expressing legislative intent concerning the use of the single-factor apportionment formula and the elimination of the Compact's election provision. This was germane to the original purpose of amending the MBT Act because, as discussed, the elimination of the Compact's election provision was pertinent to the proper method of apportionment under the MBT Act. Therefore, the repeal of the Compact was sufficiently interconnected with the MBT Act that it fell within the basic purpose of the original bill. This was a far cry from the introduction of an entirely new and different subject matter, as in *Toth v Callaghan*, 995 F Supp 2d 774, 778 (ED Mich, 2014), where a bill that began by allowing emergency managers to reject, modify, or terminate collective bargaining agreements ended up being passed as a bill that excluded graduate student research assistants from the definition of "public employee."

2. THE FIVE-DAY RULE

Plaintiffs have also failed to establish a violation of the Five-Day Rule. Const 1963, art 4, § 26 provides, in relevant part: "No bill shall be passed or become a law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days."

> The five-day rule and the change of purpose provision were contained in the same article and section of the Constitution of 1908. Const 1908, art 5, § 22. It is clear that the function of the change of purpose provision, both in the Constitution of 1908 and as modified in the Constitution of 1963, is to fulfill the command of the five-day rule.
>
> Whether measured by the title of the act or by the title and contents of the act, the five-day rule could be rendered ineffective without a change of purpose provision. It is equally clear that a change of purpose rule standing alone would be meaningless, because any time the purpose of a bill was changed it would be a new bill which could be passed immediately. In sum, the alteration of purpose provision operates as an ultimate limitation to prevent evasion of the five-day rule. [*Anderson*, 419 Mich at 329-330.]

"A long history underscores an intent through these requirements to preclude last-minute, hasty legislation and to provide notice to the public of legislation under consideration irrespective of legislative merit." *Id*. at 329.

The legislative record establishes that SB 156 was before each house for at least five days. And as discussed earlier, there was no change of the original bill's purpose. Accordingly, no violation of the Five-Day Rule occurred.

3. DISTINCT-STATEMENT CLAUSE

Finally, plaintiffs have not established a violation of the Distinct-Statement Clause. Const 1963, art 4, § 32, provides: "Every law which imposes, continues or revives a tax shall distinctly state the tax." The purpose of this provision "is to prevent the Legislature from being deceived in regard to any measure for levying taxes, and from furnishing money that might by some indirection be used for objects not approved by the Legislature." *Dawson v Secretary of State*, 274 Mich App 723, 747; 739 NW2d 339 (2007) (opinion by WILDER, P.J.) (citations, quotation marks, and emphasis omitted). The Distinct-Statement Clause is violated if a statute imposes an obscure or deceitful tax. *Dukesherer Farms, Inc v Dep't of Agriculture Dir*, 73 Mich App 212, 221; 251 NW2d 278 (1977), aff'd 405 Mich 1 (1979), such as when a tax is disguised as a regulatory fee, *Dawson*, 274 Mich App at 740. 2014 PA 282 does not impose or revive any tax, but clarifies the Legislature's intent regarding apportionment of the MBT tax base. There is nothing deceptive about the legislation. It is clear from the title and body of 2014 PA 282 that it is amending the MBT Act. There has been no violation of the Distinct-Statement Clause.

I. DISCOVERY

"[S]ummary disposition is premature if granted before discovery on a disputed issue is complete. However, summary disposition is appropriate if there is no fair chance that further discovery will result in factual support for the party opposing the motion." *Mackey v Dep't of Corrections*, 205 Mich App 330, 333; 517 NW2d 303 (1994) (citation omitted). As alluded to earlier, plaintiffs wanted to engage in discovery regarding Michigan's participation in the Commission since 2008, which according to plaintiffs would establish that the Compact was not in fact repealed retroactively beginning on January 1, 2008, because Michigan in fact participated in the Commission during the relevant time.

But as we also alluded to earlier, discovery on any of these issues would not produce relevant information. Setting aside plaintiffs' failure to cite authority regarding the relevancy of Michigan's participation in the Commission, more to the point is the fact that the issues raised concern statutory interpretation and constitutional challenges. And those issues are, as we said before, matters of law. *Elba Twp*, 493 Mich at 277-278; see also *Hunter*, 484 Mich at 257; *GMAC*, 286 Mich App at 380. How and to what extent the state participated in the Commission has no bearing on the meaning or effect of the words used in the statute or the state and federal Constitutions. Accordingly, discovery on this issue did not stand a fair chance of providing support for plaintiffs' position.

Discovery was also not required regarding the extent of plaintiffs' reliance on the Compact's election provision. As a matter of law, taxpayers do "not have a vested right in a tax statute or in the continuance of any tax law," *Walker*, 445 Mich at 703, while states have wide latitude in the selection of apportionment methodologies, *Moorman*, 437 US at 274. And a taxpayer's reliance on a particular tax law is insufficient to establish a due process violation because "[t]ax legislation is not a promise, and a taxpayer has no vested right in" a tax statute. *Carlton*, 512 US at 33. Therefore, plaintiffs have not established a fair chance that discovery on the extent of their reliance on the Compact apportionment method would have led to any relevant support for their position.

Plaintiffs also incorrectly contend that discovery should have been held regarding the Legislature's intent in enacting 2014 PA 282, including internal communications regarding the purpose of the legislation. But as we previously made clear, statements of individual legislators generally do not comprise proper evidence of legislative intent. See *Chmielewski*, 457 Mich at 609 n 18; *Detroit Bd of Ed*, 227 Mich App at 89 n 4; *City of Williamston*, 142 Mich App at 719, citing *Presque Isle*, 364 Mich at 612. Hence, discovery on this issue would not have had a fair chance of producing support for plaintiffs' position.

Affirmed. No costs, an issue of public importance being involved. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Patrick M. Meter

APPENDIX C

STATE OF MICHIGAN
COURT OF CLAIMS

Case No. 14-000219-MT

INTERNATIONAL BUSINESS MACHINES CORPORATION

v.

DEPT OF TREASURY

Hon. Michael J. Talbot

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014

ORDER

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro, Inc v Dep't of Treasury*, No. 11-000033-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiffs claim. Accordingly, the Court grants summary disposition to the Department pursuant to MCR 2.116(I)(1). This order resolves the last pending claim and closes the case.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL] A true copy entered and certified by Jerome W. Zimmer Jr., Clerk, on

DEC 19 2014 [Illegible]
Date Clerk

APPENDIX D

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

SC: 153281
COA: 327360
Court of Claims: 12-000102-MT

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

September 6, 2016

ORDER

On order of the Court, the application for leave to appeal the January 21, 2016 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARKMAN, J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *Gillette Commercial Operations North America v Dep't of Treasury*, 499 Mich 960, 961-962 (2016).

VIVIANO, J., joins the statement of MARKMAN, J.

[SEAL] I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 6, 2016 /s/ Larry S. Royster
Clerk

APPENDIX E

UNPUBLISHED

STATE OF MICHIGAN
COURT OF APPEALS

No. 326414
Court of Claims LC No. 14-000068-MT

SAPA EXTRUSIONS, INC., formerly known as
ALCOA EXTRUSIONS, INC.

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326415
Court of Claims LC No. 14-000069-MT

BALL CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326512
Court of Claims LC No. 13-000044-MT

FAMILY DOLLAR STORES, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326513
Court of Claims LC No. 14-000088-MT

FAMILY DOLLAR STORES, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY

Defendant-Appellee.

No. 326585
Court of Claims LC No. 15-000013-MT

GOODYEAR TIRE AND RUBBER COMPANY,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326586
Court of Claims LC No. 14-000029-MT

FAMILY DOLLAR STORES, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326732
Court of Claims LC No. 15-000057-MT

WEBLOYALTY HOLDINGS, INC. & SUBSIDIARIES,

Plaintiff-Appellant,

v.

Department of Treasury,

Defendant-Appellee.

No. 326733
Court of Claims LC No. 15-000056-MT

AFFINION GROUP HOLDINGS, INC. & SUBSIDIARIES,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326818
Court of Claims LC No. 14-000145-MT

EMC CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 326819
Court of Claims LC No. 13-000119-MT

EMC CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327360
Court of Claims LC No. 12-000102-MT

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 327725
Court of Claims LC No. 14-000287-MT

DELUXE FINANCIAL SERVICES, LLC,
Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,
Defendant-Appellee.

No. 327880
Court of Claims LC No. 15-000096-MT

SCHWAN'S HOME SERVICE, INC.,
Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,
Defendant-Appellee.

No. 327962
Court of Claims LC No. 12-000083-MT

MONSTER BEVERAGE CORPORATION,
Plaintiff-Appellant,

v

DEPARTMENT OF TREASURY,
Defendant-Appellee.

No. 327963
Court of Claims LC No. 12-000122-MT

MONSTER BEVERAGE CORPORATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

No. 328231
Court of Claims LC No. 15-000134-MT

SCHWAN'S HOME SERVICE, INC.,

Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,

Defendant-Appellee.

January 21, 2016

Before: RIORDAN, P.J., and JANSEN
and FORT HOOD, JJ.

PER CURIAM.

In these 16 consolidated appeals, plaintiffs are taxpayers who respectively appeal as of right final orders that were entered in each case following a grant of either full or partial summary disposition to defendant under MCR 2.116(I)(1). Each appeal raises identical issues challenging the validity of 2014 PA 282 ("PA 282"), which retroactively withdrew Michigan from the Multistate Tax Compact ("the Compact") and thereby eliminated a multistate taxpayer's option to elect the three-factor apportionment formula that is a key provision of the Compact. We affirm.

I. STANDARD OF REVIEW

We review *de novo* a grant of summary disposition under MCR 2.116(I)(1). *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, ___ Mich App ___, ___; ___ NW2d ___ (2015) (Docket Nos. 325258 *et al*), lv pending; 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." Issues of statutory interpretation and the resolution of constitutional issues are also subject to *de novo* review. *Gillette*, ___ Mich App at ___; slip op at 16.

II. DISCUSSION

Plaintiffs present multiple state and federal constitutional challenges to PA 282, which are identical in all relevant respects to the arguments raised by the plaintiffs in *Gillette*. In *Gillette*, we rejected all of the plaintiffs' arguments.

In particular, we held that the Compact was not a binding agreement on this state but was merely an advisory agreement, such that PA 282's removal of Michigan from membership in the Compact was not prohibited; no violation of the Contract Clauses of either the federal or state Constitutions occurred. *Gillette*, ___ Mich App at ___; slip op at 21. Further, we concluded that "the retroactive repeal of the Compact did not violate the Due Process Clauses of either the state or federal [C]onstitutions or Michigan's rules regarding retrospective legislation. Nor did it violate the terms of the Compact itself." *Id*. at ___; slip op at 22. We also held that the enactment of PA 282 "did not violate the separation of powers provision of the state Constitution[.]" *Id*. at ___; slip op at 30. In addition, "PA 282 does not violate the Commerce Clause" of the United States Constitution. *Id*. at ___; slip op at 32. Nor was there a violation of "the right to petition the government under the First Amendment of the federal Constitution or the analogous Michigan provision." *Id*. We further held that "the enactment of 2014 PA 282 did not violate the Title-Object Clause, the Five-Day Rule, or the Distinct-Statement Clause of the Michigan Constitution." *Id*. at ___; slip op at 34. Finally, summary disposition was not premature because discovery would not have produced relevant support for the plaintiffs' position. *Id*. at ___; slip op at 39-40.

III. CONCLUSION

In short, we rejected in *Gillette* the same arguments that plaintiffs raise in these consolidated appeals. Thus, plaintiffs' challenges to PA 282, and their respective challenges to the grant of either full or partial summary disposition in favor of defendant in each case, are devoid of merit.

Affirmed.

/s/ Michael J. Riordan
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

APPENDIX F

STATE OF MICHIGAN
COURT OF CLAIMS

Case No. 12-000102-MT

INTERNATIONAL BUSINESS MACHINES CORPORATION

v.

DEPT OF TREASURY

Hon. Michael J. Talbot

At a session of said Court held in,
Detroit, Wayne, Michigan, on
December 19, 2014

ORDER

Having reviewed the complaint in the present matter, the Court concludes that plaintiff's request for a refund is partially premised on the elective three-factor apportionment formula of the Multistate Tax Compact. In 2014 PA 282, the Legislature retroactively repealed the Compact provisions. For the reasons stated in this Court's December 19, 2014, opinions in *Ingram Micro*, *Inc v Dep't of Treasury,* No. 11-000033-MT and *Yaskawa America, Inc v Dep't of Treasury*, No. 11-000077-MT, the Court concludes that PA 282 applies to this action and negates the basis for plaintiff's claim. Accordingly, the Court grants partial summary disposition to the Department pursuant to MCR 2.116(I)(1).

With respect to the remaining claims, the parties have until February 2, 2015, to file dispositive motions. Any response must be filed within 14 days of the service of said motion. The parties will be notified if the Court determines that oral argument is necessary.

/s/ Michael J. Talbot
Michael J. Talbot, Chief Judge

[SEAL] A true copy entered and certified by Jerome W. Zimmer Jr., Clerk, on

DEC 19 2014 [Illegible]
Date Clerk

APPENDIX G

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

Court of Claims No. 12-102-MT

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Plaintiff,
v.

MICHIGAN DEPARTMENT OF TREASURY and THE REVENUE DIVISION OF THE MICHIGAN DEPARTMENT OF TREASURY,
Defendants.

The Honorable Michael J. Talbot

Miller, Canfield, Paddock & Stone, PLC
Gregory A. Nowak (P39240)
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Revenue & Collections Division
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(517) 373-3203

STIPULATED ORDER OF DISMISSAL
OF COUNT VI

At a session of said Court, held in the
County of Wayne, and State of Michigan,
on this 29 day of April, 2015

PRESENT: Michael J. Talbot
Michael J. Talbot

WHEREAS:

1) This Court entered an Order on December 19, 2014 (the "Order") stating that that International Business Machines Corporation ("Plaintiff") request for refund was partially premised on the elective three-factor apportionment formula of the Multistate tax Compact (the "Compact"), that the Michigan Legislature retroactively repealed the Compact provision in 2014 PA 282 ("PA 282");

2) That for the reasons stated in Opinion and Orders entered in the matters of *Ingram Micro, Inc. v. Michigan Department of Treasury,* Case No. 11-000035-MT and *Yaskawa America, Inc. v. Michigan Department of Treasury*, Case No. 11-000077-MT, this Court concluded that PA 282 applies to this action and negates the basis for Plaintiff's refund claim as it relates to the Compact;

3) The Court therefore granted partial summary disposition to the Michigan Department of Treasury and the Revenue Division of the Michigan Department of Treasury (the "Department") pursuant to MCR 2.116(I)(1) as to the Counts I-V (the "MTC Counts");

4) The Court further provided a deadline of February 2, 2015 to file a dispositive motion as to the remaining claims, other than the MTC Counts;

5) The only remaining claim is Count VI – Other Adjustments for Tax Year Ended December 31, 2009;

6) As set forth on the Michigan Business Tax (MBT) Annual Return Notice of Refund Adjustment dated January 28, 2015 at Line 34, Treasury agreed to eliminate the royalty expenses that were previously added to Plaintiff's tax base;

7) Plaintiff agrees to accept the calculations in the amended notices;

8) In light of this agreement, the parties through their respective counsel have agreed to dismiss this claim without costs or attorney fees to either party.

IT IS ORDERED that Count VI – Other Adjustments for Tax Year Ended December 31, 2009 is hereby dismissed with prejudice and without the award of costs or attorney fees. This order resolves the last pending claim and closes the case.

IT IS SO ORDERED.

Date: APR 29 2015

/s/ Michael J. Talbot
Michael J. Talbot

SO STIPULATED:

INTERNATIONAL BUSINESS
MACHINES CORPORATION

/s/ Gregory A. Nowak Dated: April 24, 2015
Gregory A. Nowak (P39240)
Attorney for Plaintiff
Miller Canfield Paddock & Stone PLC

MICHIGAN DEPARTMENT OF TREASURY

Dated: 4/28/2015

/s/ Zachary C. Larsen (with consent)
Zachary C. Larsen (P72189)
Attorney for Defendant
Assistant Attorney General
24325686.1\042635-01509

INTERNATIONAL BUSINESS
MACHINES CORPORATION

/s/ Gregory A. Nowak Dated: April 24, 2015
Gregory A. Nowak (P39240)
Attorney for Plaintiff
Miller Canfield Paddock & Stone PLC

MICHIGAN DEPARTMENT OF TREASURY

/s/ Zachary C. Larsen Dated: April 27, 2015
Zachary C. Larsen (P72189)
Attorney for Defendant
Assistant Attorney General
24325686.1\042635-01509

APPENDIX H

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

Docket No. 146440

INTERNATIONAL BUSINESS MACHINES CORP

v.

DEPARTMENT OF TREASURY

Argued January 15, 2014 (Calendar No. 1).
Decided July 14, 2014

Chief Justice:
Robert P. Young, Jr.

Justices:
Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano

Reporter of Decisions:
Corbin R. Davis

Syllabus

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

International Business Machines Corporation (IBM) brought an action in the Court of Claims against the Department of Treasury, challenging the department's ruling that IBM was not entitled to apportion its business income tax base and modified gross receipts tax base using the three-factor apportionment formula provided in the Multistate Tax Compact, MCL 205.581 *et seq.,* and was instead required to apportion its income using the sales-factor formula in the Business Tax Act, MCL 208.1101 *et seq.,* when calculating its state taxes for 2008. Under this ruling, IBM was entitled to a refund of only $1,253,609 for the 2008 tax year rather than the $5,955,218 it had sought. IBM moved for summary disposition under MCR 2.116(C)(10), and the department moved for summary disposition under MCR 2.116(1)(2). After a hearing, the Court of Claims, Joyce A. Draganchuk, J., denied IBM's motion and granted summary disposition in favor of the department, ruling that the BTA mandated the use of the sales-factor apportionment formula. The Court of Appeals, RONAYNE KRAUSE, P.J., and BORRELLO, J. (RIORDAN, J., concurring), affirmed the Court of Claims order in an unpublished opinion per curiam issued November 20, 2012 (Docket No. 306618). It held that because there was a facial conflict between the BTA's mandatory sales-factor apportionment formula and the Compact's elective three-factor apportionment formula, the Legislature had repealed the Compact's election provision by implication when it enacted the BTA. The Supreme Court granted IBM's application for leave to appeal. 494 Mich 874 (2013).

In a lead opinion by Justice VIVIANO, joined by Justices CAVANAGH and MARKMAN, and a concurring opinion by Justice ZAHRA, the Supreme Court *held:*

The modified gross receipts tax is an income tax for purposes of the Multistate Tax Compact. IBM was entitled to use the Compact's elective three-factor apportionment formula to calculate its 2008 Michigan taxes.

Court of Appeals judgment reversed; Court of Claims order granting summary disposition in favor of the Department reversed; case remanded to the Court of Claims for entry of an order granting summary disposition in favor of IBM.

Justice VIVIANO, joined by Justices CAVANAGH and MARKMAN, held that the modified gross receipts tax fit within the Compact's broad definition of "income tax" by taxing a variation of net income, specifically, the entire amount received by the taxpayer as determined from any gainful activity minus inventory and certain other deductions that are expenses not specifically and directly related to a particular transaction. He further concluded that the Court of Appeals erred by holding that the BTA had repealed the Compact's election provision by implication because the statutes could be reconciled when read *in pari materia.*

Justice ZAHRA, concurring, agreed that IBM was entitled to use the Compact's elective apportionment formula for its 2008 Michigan taxes, and also that the tax bases at issue were "income taxes" within the meaning of the Compact. He would not have reached the question whether the Legislature repealed the Compact's election provision by implication when it enacted the BTA because the Legislature made clear that taxpayers were entitled to use the Compact's election provision for the 2008, 2009, and 2010 tax years.

Justice MCCORMACK, joined by Chief Justice YOUNG and Justice KELLY, dissenting, would have affirmed the Court of Appeals judgment, concluding that allowing taxpayers to apportion their multistate income in accordance with the Compact's formula violated the Legislature's unambiguous directive that taxes established under the BTA must be in accordance with the BTA's sales-only apportionment formula. She further concluded that there was no constitutional barrier that prevented the Legislature from making the Compact's alternative election provision unavailable to taxpayers

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

No. 146440

INTERNATIONAL BUSINESS MACHINES CORP

v

DEPARTMENT OF TREASURY

Filed: July 14, 2014

Chief Justice:
Robert P. Young, Jr.

Justices:
Michael F. Cavanagh
Stephen J. Markman
Mary Beth Kelly
Brian K. Zahra
Bridget M. McCormack
David F. Viviano

OPINION

BEFORE THE ENTIRE BENCH

VIVIANO, J.

In this case, we must determine whether plaintiff International Business Machines Corporation (IBM) could elect to use the three-factor apportionment formula under the Multistate Tax Compact[1] (the Compact) for its 2008 Michigan taxes, or whether it was required to use the sales-factor apportionment formula under the Michigan Business Tax Act (BTA).[2] The Department of Treasury (the Department) rejected IBM's attempt to use the Compact's apportionment formula and, instead, required IBM to apportion its income using the BTA's sales-factor formula.

We conclude that IBM was entitled to use the Compact's three-factor apportionment formula for its 2008 Michigan taxes and that the Court of Appeals erred by holding otherwise on the basis of its erroneous conclusion that the Legislature had repealed the Compact's election provision by implication when it enacted the BTA. We further hold that IBM could use the Compact's apportionment formula for that portion of its tax base subject to the modified gross receipts tax of the BTA.

Accordingly, we reverse the Court of Appeals judgment in favor of the Department, reverse the Court of Claims order granting summary disposition in favor of the Department, and remand to the Court of Claims for entry of an order granting summary disposition in favor of IBM.

I. FACTS AND PROCEEDINGS

IBM is a corporation based in New York that provides information technology products and services worldwide. In December 2009, IBM filed its Michigan Business Tax annual return for the 2008 tax year. Line 10 of IBM's return, the "Apportionment Calculation" line, read "SEE ATTACHED ELECTION." IBM

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[1] MCL 205.581 *et seq.*

[2] MCL 208.1101 *et seq.*

filed a separate statement along with its return, entitled "Election to use MTC Three Factor Apportionment," indicating that it elected to apportion its business income tax base and modified gross receipts tax base using the three-factor apportionment formula provided in the Compact. Under these calculations, IBM sought a refund of $5,955,218. The Department disagreed. It determined that IBM could not elect to use the Compact's formula and that IBM was entitled to a refund of only $1,253,609 when calculated under the BTA's sales-factor apportionment formula.

IBM filed a complaint in the Court of Claims, challenging the Department's decision. Thereafter, IBM moved for summary disposition under MCR 2.116(C)(10), and the Department moved for summary disposition under MCR 2.116(I)(2). After a hearing on the motions, the Court of Claims denied summary disposition to IBM and granted summary disposition in favor of the Department. The Court of Claims determined that the BTA mandated the use of the sales-factor apportionment formula.

In an unpublished opinion, the Court of Appeals affirmed the Court of Claims order granting summary disposition in favor of the Department.[3] The Court of Appeals first determined that there was a facial conflict between the BTA and the Compact insofar as the BTA mandates use of the sales-factor formula while the Compact permits taxpayers to elect to use a three-factor apportionment formula.[4] On the basis of this conflict, the Court of Appeals concluded that

[3] *IBM v Dep't of Treasury,* unpublished opinion per curiam of the Court of Appeals, issued November 20, 2012 (Docket No. 306618).

[4] *Id.* at 3.

the Legislature had repealed the Compact's election provision by implication when it enacted the BTA.[5] The Court of Appeals then stated that it did not need to decide whether the modified gross receipts tax was an "income tax" under the Compact subject to the Compact's apportionment formula in light of its conclusion that the Compact's election provision had been repealed by implication.[6] IBM sought leave to appeal in this Court. We granted IBM's application and asked the parties to address

> (1) whether the plaintiff could elect to use the apportionment formula provided in the Multistate Tax Compact, MCL 205.581, in calculating its 2008 tax liability to the State of Michigan, or whether it was required to use the apportionment formula provided in the Michigan Business Tax Act, MCL 208.1101 *et seq.;* (2) whether § 301 of the Michigan Business Tax Act, MCL 208.1301, repealed by implication Article III(1) of the Multistate Tax Compact; (3) whether the Multistate Tax Compact constitutes a contract that cannot be unilaterally altered or amended by a member state; and (4) whether the modified gross receipts tax component of the Michigan

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[5] *Id.* at 3-4. It also determined that the Compact was not a binding contract.

[6] *Id.* at 5. Judge RIORDAN concurred in all respects except regarding the issue of repeal by implication. He determined that the panel did not need to conclude that the BTA had impliedly repealed the Compact because MCL 208.1309 allowed the taxpayer to petition for another apportionment formula. He concluded that the plain language of the BTA required IBM to apportion its income tax consistently with the BTA.

Business Tax Act constitutes an income tax under the Multistate Tax Compact.[7]

II. STANDARD OF REVIEW

We review de novo a Court of Claims decision on a motion for summary disposition.[8] We also review de novo issues of statutory interpretation.[9]

III. HISTORY OF BUSINESS TAXATION IN MICHIGAN

Because we believe it important to our analysis in this case, we begin with a discussion of the history of business taxation in Michigan. Michigan's taxation of business income or activity began in 1953, when the Legislature enacted a business activities tax that taxed the adjusted receipts of a taxpayer.[10] This tax remained in effect until Michigan adopted its first corporate income tax as part of the Income Tax Act of 1967 (ITA).[11] Against the backdrop of the ITA, Michigan joined the Multistate Tax Compact in 1970

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[7] *IBM v Dep't of Treasury,* 494 Mich 874 (2013).

[8] *Malpass v Dep't of Treasury,* 494 Mich 237, 245; 833 NW2d 272 (2013).

[9] *Id.*

[10] See 1953 PA 150. See also *Armco Steel Corp v Dep't of Revenue,* 359 Mich 430, 444; 102 NW2d 552 (1960) ("This tax is part of a general scheme of State taxation of business activities in Michigan. It is a tax on Michigan activities measured, in amount, by adjusted receipts derived from or attributable to Michigan sources . . . .").

[11] See MCL 206.61, as enacted by 1967 PA 281. The stated purpose of the ITA was "to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, and enforcement by lien and otherwise of taxes on or measured by net income activities . . . ." Title, 1967 PA 281.

when the Legislature enacted MCL 205.581.[12] The Compact "symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer."[13] Thus, the goals of the Compact include facilitating and promoting equitable and uniform taxation of multistate taxpayers.[14] To this end, the Compact operates in conjunction with Michigan's tax acts, containing several provisions designed to ensure uniform taxation of multistate taxpayers.

In 1976, the Legislature replaced the corporate income tax with a single business tax.[15] Unlike its predecessor, the Single Business Tax Act (SBTA) taxed business activity, not income, and operated as "a form of value added tax."[16] In enacting the SBTA, the Legislature expressly amended the ITA to the extent necessary to implement the SBTA and expressly repealed provisions of the ITA that would conflict with

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[12] 1969 PA 343. Section 1 of 1969 PA 343, codified under MCL 205.581, includes the mandatory provisions of the Compact that must be enacted for a state to become a member. See *US Steel Corp v Multistate Tax Comm,* 434 US 452, 455-456; 98 S Ct 799; 54 L Ed 2d 682 (1978).

[13] *US Steel Corp,* 434 US at 456.

[14] See MCL 205.581, Art I ("The purposes of this compact are to: (1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment on tax bases and settlement of apportionment disputes[,] (2) Promote uniformity or compatibility in significant components of tax systems[,] (3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration[,] and (4) Avoid duplicative taxation.").

[15] See MCL 208.1 *et seq.,* as enacted by 1975 PA 228.

[16] *Trinova Corp v Dep't of Treasury,* 433 Mich 141, 149; 445 NW2d 428 (1989).

the SBTA.[17] The Legislature, however, did not expressly repeal the Compact.[18]

The SBTA remained in effect until 2008, when the Legislature enacted the BTA, which is at issue in this case.[19] Representing another shift in business taxation, the BTA imposed two main taxes: the business income tax and the modified gross receipts tax.[20] In enacting the BTA, the Legislature expressly repealed the SBTA, but again did not expressly repeal the Compact.[21] However, the BTA was short-lived. Effective January 1, 2012, Michigan returned to a corporate income tax.[22] At the same time, the Legislature stayed true to its past practice of repealing conflicting tax acts and expressly repealed the BTA.[23]

Throughout the evolution of our state's method of business taxation, the Compact has remained in effect.

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[17] See 1975 PA 233.

[18] See *id.*

[19] 2007 PA 36; MCL 208.1101 *et seq.*

[20] See MCL 208.1201; MCL 208.1203.

[21] Enacting section 1 of 2006 PA 325 provides: "The single business tax act, 1975 PA 228, MCL 208.1 to 208.145, is repealed effective for tax years that begin after December 31, 2007."

[22] See 2011 PA 38.

[23] See 2011 PA 39, which reads in part:

> Enacting section 1. The Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, is repealed effective on the date that the secretary of state receives a written notice from the department of treasury that the last certificated credit or any carryforward from that certificated credit has been claimed.
>
> Enacting section 2. This amendatory act does not take effect unless House Bill No. 4361 of the 96th Legislature is enacted into law.

Another constant throughout this history is that the Legislature has always required a multistate taxpayer with business income or activity both within and without the state to apportion its tax base.[24] This process, known as formulary apportionment, has allowed Michigan to tax the portion of a taxpayer's multistate business carried on in Michigan without violating the Due Process Clause of the United States Constitution.[25] We now address whether a multistate taxpayer retained the privilege of electing the apportionment method provided by the Compact for the 2008 tax year.

IV. WHETHER IBM COULD ELECT TO USE THE COMPACT'S APPORTIONMENT FORMULA FOR ITS 2008 TAXES

To determine whether IBM could elect to use the Compact's three-factor apportionment formula to calculate its 2008 Michigan taxes, we must decide if the Legislature repealed the Compact's election provision by implication when it enacted the BTA.[26]

A. LEGAL PRINCIPLES

We begin our analysis "with the axiom that repeals by implication are disfavored."[27] We will presume,

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[24] See MCL 205.553, as amended by 1954 PA 17; 1970 CL 206.115; 1979 CL 208.41; MCL 208.1301.

[25] *Malpass,* 494 Mich at 245-246.

[26] This is the principal argument offered by the Department in disallowing use of the Compact's apportionment formula. In the alternative, the Department argues the Compact can be harmonized with the BTA by reading the Compact's election provision and apportionment formula into MCL 208.1309. We address this argument in note 55 of this opinion.

[27] *Wayne Co Pros v Dep't of Corrections,* 451 Mich 569, 576; 548 NW2d 900 (1996). The implied repeal doctrine has "remained stable over approximately four centuries of common law in the

"in most circumstances, that if the Legislature had intended to repeal a statute or statutory provision, it would have done so explicitly."[28] Nevertheless, "[w]hen the intention of the legislature is clear, repeal by implication may be accomplished by the enactment of a subsequent act inconsistent with a former act" or "by the occupancy of the entire field by a subsequent enactment."[29] However, "where the intent of the Legislature is claimed to be unclear, it is our duty to proceed on the assumption that the Legislature desired both statutes to continue in effect unless it manifestly appears that such view is not reasonably plausible."[30] Repeals by implication will be allowed "only when the inconsistency and repugnancy are plain and unavoidable."[31] We will "construe statutes, claimed to be in conflict, harmoniously" to find *"any other* reasonable construction" than a repeal by implication.[32] Only

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United Kingdom and then here in the United States." Markham, *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation under the Ballooning Conception of "Plain Repugnancy,"* 45 Gonz L Rev 437, 464 (2010). Lord Edward Coke recognized the implied repeal doctrine as far back as 1614. See *id.,* p 456-458 (discussing Lord Coke's seminal case on the implied repeal doctrine—Doctor *Foster's Case,* 77 Eng Rep 1222 (KB, 1614)).

[28] *Wayne Co Pros,* 451 Mich at 576.

[29] *Washtenaw Co Rd Comm'rs v Pub Sery Comm,* 349 Mich 663, 680; 85 NW2d 134

[30] *Wayne Co Pros,* 451 Mich at 577.

[31] *Tillotson v Saginaw,* 94 Mich 240, 244-245; 54 NW 162 (1892).

[32] *Wayne Co Pros,* 451 Mich at 576-577 (emphasis added; citations and quotation marks omitted).

when we determine that two statutes "are so incompatible that both cannot stand" will we find a repeal by implication.[33]

In attempting to find a harmonious construction of the statutes, we "will regard all statutes upon the same general subject-matter as part of one system . . ."[34] Further, "[s]tatutes *in pari materia,* although in apparent conflict, should, so far as reasonably possible, be construed in harmony with each other, so as to give force and effect to each . . . ."[35] This Court has stated:

> It is a well-established rule that in the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another. The endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature, or to discover how the policy of the legislature with reference to the subject-matter has been changed or modified from time to time. In

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[33] *Valentine v Redford Twp Supervisor,* 371 Mich 138, 144; 123 NW2d 227 (1963). As with any issue of statutory interpretation, our goal "is to give effect to the Legislature's intent, focusing first on the statute's plain language." *Malpass,* 494 Mich at 247-248 (citation and quotation marks omitted).

[34] *Rathbun v State of Michigan,* 284 Mich 521, 544; 280 NW 35 (1938) (citation and quotation marks omitted).

[35] *Id.* (citation and quotation marks omitted).

> other words, in determining the meaning of a particular statute, resort may be had to the established policy of the legislature as disclosed by a general course of legislation. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also acts passed at prior and subsequent sessions.[36]

In this case, the Compact's election provision and § 301 of the BTA share the common purpose of setting forth the methods of apportionment of a taxpayer's multistate business income; therefore, we must construe them together as statutes *in pari materia.*[37]

B. APPLICATION

With the history of Michigan business taxation and applicable legal principles in mind, we turn to the specific statutes at issue. IBM sought to apportion its BTA tax base using the Compact's three-factor apportionment formula.[38] In so doing, IBM relied on the Compact's election provision, which reads in pertinent part:

> (1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may

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[36] *Id.* at 543-544 (citation and quotation marks omitted).

[37] *Id.* at 543 ("Statutes *in pari materia* are those . . . which have a common purpose . . .").

[38] MCL 205.581, Art IV(9) ("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.").

> elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV . . . .[39]

This provision allows a taxpayer subject to an income tax to elect to use a party state's apportionment formula or the Compact's three-factor apportionment formula.

However, the Department rejected IBM's attempts to apportion its income through the Compact's apportionment formula. Instead, it required IBM to apportion its BTA tax base consistently with the BTA and its sales-factor formula. Section 301 of the BTA reads as follows:

> (1) Except as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter.
>
> (2) Each tax base of a taxpayer whose business activities are confined solely to this state shall be allocated to this state. Each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state shall be apportioned to this state by multiplying each tax base by the sales factor calculated under section 303.[40]

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[39] MCL 205.581, Art III(1).

[40] MCL 208.1301.

We recognize that the language of the BTA is mandatory in nature.[41] Under the statute, a taxpayer's BTA tax base must be apportioned through the BTA's sales-factor apportionment formula.[42] The Department argues that this mandatory language precludes the use of any other apportionment formula and, reading it in isolation, we would agree. However, as stated previously, § 301 of the BTA is not the only provision of Michigan's tax laws pertaining to the apportionment of business income—the Compact's election provision shares the same purpose. Therefore, we cannot interpret § 301 of the BTA in a vacuum.[43] Rather, we must consider it along with the Compact "by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the legislature."[44]

The BTA is not the first Michigan business tax act to contain a mandatory apportionment formula. All our past business tax acts mandated that a taxpayer with income or activity that was taxable within and without the state allocate and apportion its tax base

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[41] See *Fradco v Dep't of Treasury,* 495 Mich 104, 114; 845 NW2d 81 (2014) ("The Legislature's use of the word 'shall' . . . indicates a mandatory and imperative directive.").

[42] MCL 208.1301(1).

[43] See also *People v Stephan,* 241 Mich App 482, 497; 616 NW2d 188 (2000) (recognizing that interpreting the unambiguous language of two conflicting statutes does not end the analysis because "courts do not construe individual statutes in a vacuum" but rather construe statutes together under the doctrine of *in pari materia).*

[44] *Rathbun,* 284 Mich at 543-544 (stating further that courts "'will regard all statutes upon the same general subject matter as part of one system'") (citation omitted).

consistently with each respective act.[45] These acts further mandated that the tax base be apportioned through a specific apportionment formula.[46] The mandatory apportionment language of the BTA is nearly identical to the language of its predecessors.

The Department argues that the Legislature repealed the Compact's election provision when it enacted the BTA because § 301 of the BTA is the first tax provision with apportionment language directly in conflict with the Compact's election provision. The import of this argument is that the Compact's election provision was a dead letter when it was enacted because both the ITA and the election provision required use of the same three-factor apportionment

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[45] See MCL 205.552, as amended by 1954 PA 17 (providing that "[t]he adjusted receipts of a taxpayer derived from or attributable to Michigan sources shall be determined in accordance with the provisions of section 3 of this act"); 1970 CL 206.103 (providing that "[a]ny taxpayer having income from business activity which is taxable both within and without this state . . . shall allocate and apportion his net income as provided in this act"); 1979 CL 208.41 (providing that "[a] taxpayer whose business activities are taxable both within and without this state, shall apportion his tax base as provided in this chapter").

[46] See MCL 205.553(b), as amended by 1954 PA 17 (requiring that a taxpayer with adjusted receipts attributable to activity within and without Michigan apportion the receipts consistent with a three-factor formula); 1970 CL 206.115 (requiring that 101 business income . . . shall be apportioned to this state" through the standard three-factor apportionment formula); 1979 CL 208.45 (requiring that 141 of the tax base . . . shall be apportioned to this state" through the three-factor apportionment formula). In 1991, the Legislature began to phase out the SBTA's equally weighted, three-factor apportionment formula, requiring a progressively more sales-factor-focused apportionment formula. See MCL 208.45, as amended by 1991 PA 77. However, the new apportionment formula was still mandatory.

formula. However, the Department's argument overlooks that the Compact's election provision, by using the terms "may elect," contemplates a divergence between a party state's mandated apportionment formula and the Compact's own formula—either at the time of the Compact's adoption by a party state or at some point in the future.[47] Otherwise, there would be no point in giving taxpayers an election between the two. In fact, reading the Compact's election provision as forward-looking—i.e., contemplating the future enactment of a state income tax with a mandatory apportionment formula different from the Compact's apportionment formula—is the only way to give meaning to the provision when it was enacted in Michigan.[48] Viewed in this light, the BTA's mandatory apportionment language may plausibly be read as compatible with the Compact's election provision.

Moreover, our review of the statutes *in pari materia* indicates a uniform and consistent purpose of the Legislature for the Compact's election provision to operate alongside Michigan's tax acts.[49] Just as it did when it enacted the ITA,[50] the Legislature, in enacting

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[47] MCL 205.581, Art III(1). See also *Black's Law Dictionary* (9th ed) (defining an "election" as "[t]he exercise of a choice; esp., the act of choosing from several possible rights or remedies in a way that precludes the use of other rights or remedies").

[48] See *Moore v Fennvile Pub Schs Bd of Ed,* 223 Mich App 196, 201; 566 NW2d 31 (1997) ("It is the duty of the courts to interpret statutes so as to render no provision meaningless.").

[49] *Rathbun,* 284 Mich at 543-544.

[50] Although the ITA's apportionment method is largely consistent with the Compact's apportionment method, caselaw during the period in which both were in effect reflects some potential for inconsistency. See *Consumers Power Co v Dep't of Treasury,* 235 Mich App 380, 386 n 6; 597 NW2d 274 (1999) (discussing definitional differences between the ITA and the

the BTA, had full knowledge of the Compact and its provisions.[51] Even with such knowledge on both occasions, the Legislature left the Compact's election provision intact. By contrast, the Legislature expressly repealed or amended other inconsistent acts regarding the taxation of businesses.[52] Had the Legislature believed that the Compact's election provision no longer had a place in Michigan's tax system or conflicted with the purpose of the BTA, it could have taken the necessary action to eliminate the election provision.

Because the Legislature gave no clear indication that it intended to repeal the Compact's election provision, we proceed under the assumption that the Legislature intended for both to remain in effect.[53] After reading the statutes *in pari materia,* we conclude that a reasonable construction exists other than a repeal by implication.[54] Under Article III(1) of the Compact, the Legislature provided a multistate taxpayer with a choice between the apportionment method contained in the Compact or the apportionment method required by Michigan's tax laws. If a taxpayer elects to apportion its income through the Compact, Article IV(9) mandates that the taxpayer do so using a three-factor apportionment formula.

Compact); *Chocola v Dep't of Treasury,* 132 Mich App 820, 831; 348 NW2d 290 (1984); *Donovan Const Co v Dep't of Treasury,* 126 Mich App 11; 337 NW2d 297 (1983).

[51] *In re Reynolds Estate,* 274 Mich 354, 362; 264 NW 399 (1936) ("The Legislature, in passing [a new act], is presumed to have done so with a full knowledge of existing statutes.").

[52] See notes 21 and 23 of this opinion.

[53] See *Wayne Co Pros,* 451 Mich at 577.

[54] *Id.* at 576-577.

Alternatively, if the taxpayer does not make the Compact election, then the taxpayer must use the apportionment formula set forth in Michigan's governing tax laws. In this case, IBM's tax base arose under the BTA. Had it not elected to use the Compact's apportionment formula, IBM would have been required to apportion its tax base consistently with the mandatory language of the BTA—i.e., through the BTA's sales-factor apportionment formula.[55] Thus, we believe the BTA and the Compact are compatible and can be read as a harmonious whole.

Subsequent action by the Legislature indicates that it did not impliedly repeal the Compact's election provision when it enacted the BTA.[56] On May 25, 2011, the Legislature expressly amended the Compact's election provision by adding the following language:

> [E]xcept that *beginning January 1, 2011* any taxpayer subject to the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, or the income tax act of 1967, 1967 PA 281,

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[55] Despite the above framework, the Department argues that if the BTA and the Compact can be harmonized, it is only through MCL 208.1309(1), which allows a taxpayer to petition to use another apportionment method. We disagree. The Department's "harmonization" would actually be an abrogation of the election provision. Section 309 requires that a taxpayer *petition* the Department for another apportionment method and prove that the BTA's apportionment provision does not fairly represent the taxpayer's business activity in the state. Thus, the Department's interpretation takes the choice out of the taxpayer's hands and is inconsistent with the plain language of the Compact. Therefore, we decline to accept the Department's proposed harmonization.

[56] See *Baxter v Robertson,* 57 Mich 127, 132; 23 NW 711 (1885) ("Legislative construction of past legislation . . . is always entitled to be considered with some care, so far as it throws light on doubtful language . . . .").

> MCL 206.1 to 206.697, shall, for purposes of that act, apportion and allocate in accordance with the provisions of that act and shall not apportion or allocate in accordance with article IV.[57]

There is no dispute that the Legislature specifically intended to retroactively repeal the Compact's election provision for taxpayers subject to the BTA beginning January 1, 2011. The Legislature could have—but did not—extend this retroactive repeal to the start date of the BTA. In addressing this legislation, the dissent suggests that "the 2011 Legislature may have simply been acting expressly to confirm what the 2007 Legislature believed it had already done implicitly."[58] We would agree with that conclusion if the Legislature had retroactively repealed the Compact's election provision beginning January 1, 2008, the effective date of the BTA. However, 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. Further, we believe that the express repeal of the Compact's election provision effective January 1, 2011, is evidence that the Legislature had not impliedly repealed the provision when it enacted the BTA.[59] Therefore, a review of the 2011 amendments supports our conclusion that the

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[57] 2011 PA 40 (emphasis added).

[58] *Post* at 6.

[59] See 1A Singer, Sutherland Statutory Construction (7th ed), § 23:11, p 485 ("[T]he later express repeal of a particular statute may be some indication that the legislature did not previously intend to repeal the statute by implication.").

Compact's election provision remained in effect for the 2008 tax year.

C. RESPONSE TO THE DISSENT

The dissent's analysis has a tantalizing simplicity to it. It homes in on the plain language and mandatory nature of the BTA's apportionment provision. However, the dissent spends very little time considering the language of the Compact, its history, or the history of business taxation in Michigan. While this approach may be proper in construing the BTA in a typical case, it is incomplete when we are faced with the question of implied repeal. Under such circumstances, that the dissent has arrived at the better or even the best interpretation *of the BTA* does not end the inquiry. Rather, because there is a presumption *against* implied repeals,[60] it is our task to determine if there is *any other reasonable construction* that would harmonize the two statutes and avoid a repeal by implication.[61]

Repeals by implication are rare, and properly so, given that we will presume under most circumstances that "if the Legislature had intended to repeal a statute or statutory provision, it would have done so

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[60] See *Jackson v Mich Corrections Comm,* 313 Mich 352, 356; 21 NW2d 159 (1946).

[61] *Wayne Co Pros,* 451 Mich at 576-577 (emphasis added). See also *Rathbun,* 284 Mich at 544-545 (If we "can by *any fair, strict, or liberal construction* find for the two provisions a reasonable field of operation, without destroying their evident intent and meaning, preserving the force of both, and construing them together in harmony with the whole course of legislation upon the subject, it is [our] duty to do so.") (emphasis added).

explicitly."[62] They are even more unlikely in the realm of our state's taxation laws.[63] This certainly creates a very high bar, but we disagree with the dissent that we have made it absolute. Rather, by using the applicable canons of construction and faithfully applying our precedents in this area, we have arrived at a reasonable construction that harmonizes the BTA and the Compact.[64]

The dissent agrees that "every attempt" must be made to construe the BTA and the Compact harmoniously. But, in the end, the dissent fails to heed this call. Instead, because of its rigid focus on the mandatory language of the BTA—to the exclusion of the language and history of the Compact, and its place in Michigan's taxation scheme—the dissent's analysis is at odds with our longstanding implied-repeal jurisprudence.

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[62] *Wayne Co Pros,* 451 Mich at 576. See also *Matsushita Elec Indus Co v Epstein,* 516 US 367, 381; 116 S Ct 873; 134 L Ed 2d 6 (1996) ("The rarity with which we have discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an 'irreconcilable conflict' between the two federal statutes at issue.").

[63] 1A Singer, Sutherland Statutory Construction (7th ed), § 23:10, p 484, citing *Sylk v United States,* 331 F Supp 661, 665 (ED Pa, 1971) ("On subjects to which the legislature pays continuous, close attention, such as internal revenue laws, the presumption against implied repeal may have greater force.").

[64] Contrary to the dissent's suggestion, 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.

D. CONCLUSION AS TO THE ISSUE OF IMPLIED REPEAL

In sum, because we are able to harmonize the BTA and the Compact's election provision, we conclude that the statutes are not "'so incompatible that both cannot stand.'"[65] We believe that our interpretation allows the Compact's election provision to serve its purpose of providing uniformity to multistate taxpayers in light of Michigan's enactment of an apportionment formula different from the Compact's formula. Any conflict apparent from a first reading of these statutes is reconcilable when the statutes are read *in pari materia.*[66] Therefore, the Department has failed to overcome the presumption against repeals by implication. Accordingly, the Court of Appeals erred by holding that the Legislature repealed the Compact's election provision by implication when it enacted the BTA. Instead, we hold that the Compact's election provision was available to IBM for the 2008 tax year.[67]

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[65] *Valentine,* 371 Mich at 144 (citation omitted).

[66] The Department also cannot show that the Legislature intended to occupy the entire field covered by the Compact when it enacted the BTA to establish a repeal by implication. *Washtenaw Co Rd Comm'rs,* 349 Mich at 680. The BTA and the Compact, while having some overlapping provisions, occupy two different fields. The BTA is a stand-alone tax act that governs the taxation of businesses. The Compact acts as an overlay to Michigan's taxation system. It is specifically designed to leave the member states with "complete control over all legislation and administrative action affecting the rate of tax, the composition of the tax base . . . , and the means and methods of determining tax liability and collecting any taxes determined to be due." *US Steel Con p,* 434 US at 457.

[67] Because we are able to harmonize the statutes and conclude that no repeal by implication occurred, we decline to discuss whether the Compact is binding and, thus, whether the

V. WHETHER THE MODIFIED GROSS RECEIPTS TAX IS AN INCOME TAX UNDER THE COMPACT

Having determined that IBM could elect to use the Compact's apportionment formula for the 2008 tax year, we must next consider whether IBM could apportion its entire BTA tax base through the Compact's apportionment formula. IBM's 2008 BTA tax base contained two components: the business income tax base and the modified gross receipts tax (MGRT) base. The parties quarrel over whether both components may be apportioned under the Compact. The Compact election is available to "[a]ny taxpayer subject to an income tax."[68] While it is undisputed that the business income tax is an income tax, the Department argues that the MGRT is not an income tax, but rather a gross receipts tax not subject to the Compact's election provision. Therefore, we must determine whether the MGRT is an income tax under the Compact and, thus, apportionable under the Compact's three-factor apportionment formula.

The Compact defines "income tax" as follows:

> [A] tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, 1 or more forms of which

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Legislature even could repeal the Compact by implication. That inquiry involves constitutional issues, which we will not reach because they are unnecessary to resolve the case. See *Booth Newspapers, Inc v Univ of Mich Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993) ("In addition, there exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case.").

[68] MCL 205.581, Art III(1).

> expenses are not specifically and directly related to particular transactions.[69]

Under the Compact's broad definition, a tax is an income tax if the tax measures net income by subtracting expenses from gross income, with at least one of the expense deductions not being specifically and directly related to a particular transaction.[70]

"Modified gross receipts tax" is not defined by the BTA, but MCL 208.1203(2) states, "[The MGRT] levied and imposed under this section is upon the privilege of doing business and not upon income or property." Although this statement indicates that the MGRT is not a tax upon income under the BTA, we must still determine whether the MGRT fits under the broad definition of "income tax" under the Compact.

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[69] MCL 205.581, Art II(4). The Compact also defines "gross receipts tax" in Art II(6) as follows:

> [A] tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

[70] We need not put a definitive label on the MGRT, a task with which commentators have struggled. See, e.g., McIntyre & Pomp, *A Policy Analysis of Michigan's Mislabeled Gross Receipts Tax,* 53 Wayne L Rev 1283 (2007) (concluding that the MGRT is akin to a sales-subtraction value added tax but that it is not a transactional tax); Gandhi, *Computing the Tax Base: The Michigan Business Tax,* 53 Wayne L Rev 1369 (2007) (concluding that the MGRT is a reverse-build of Michigan's now-repealed Single Business Tax); Grob & Roberts, *The Michigan Business Tax Replaces the State's Much-Vilified SBT,* 17-Oct J Multistate Tax'n & Incentives 8 (2007) (concluding that the MGRT is something between a gross receipts tax and a gross margin tax). Instead, we are only tasked with determining whether the MGRT qualifies as an income tax under the Compact.

The MGRT base is "a taxpayer's gross receipts . . . less purchases from other firms . ."[71] The BTA defines "gross receipts" as

> the entire amount received by the taxpayer as determined by using the taxpayer's method of accounting used for federal income tax purposes, less any amount deducted as bad debt for federal income tax purposes that corresponds to items of gross receipts . . . , from any activity whether in intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others . . . .[72]

Not only is the gross receipts amount reduced by numerous exclusions, it is also subject to a deduction for the "amount deducted as bad debt for federal income tax purposes that corresponds to items of gross receipts included in the modified gross receipts tax base."[73] This total—the entire amount received by the taxpayer from any activity minus the bad-debt deduction and the numerous exclusions under MCL 208.1111—is the gross receipts base from which the MGRT liability originates.

After the taxpayer determines its gross receipts through the above calculation, the taxpayer then reduces the gross receipts base by "purchases from other firms."[74] The "purchases from other firms" deductions include, among other things, "inventory acquired during the tax year, including freight,

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[71] MCL 208.1203(3).

[72] MCL 208.1111(1).

[73] *Id.*

[74] MCL 208.1203(3).

shipping, delivery, or engineering charges included in the original contract price"; "assets . . . acquired during the tax year of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes"; and materials and supplies to the extent not included in inventory or depreciable property.[75] There are also deductions for compensation paid in certain industries and for payments to independent contractors.[76] Once gross receipts is reduced by any applicable deductions, the taxpayer arrives at its MGRT base, which is then subject to the MGRT at a rate of .80 percent after allocation or apportionment to this state.[77]

Having examined how a taxpayer's MGRT base is calculated, we now turn to the question whether the MGRT fits within the Compact's definition of "income tax." For the MGRT to be an income tax under the Compact, a tax must measure net income by starting with gross income and subtracting expenses, with at least one of the expense deductions not specifically and directly related to a particular transaction.[78] The Compact and the BTA do not define "gross income." Therefore, we look elsewhere to determine what normally constitutes gross income. The Internal Revenue Code defines "gross income" as "all income from whatever source derived" and includes a nonexclusive

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[75] MCL 208.1113(6)(a) through (c). "Inventory" is defined as "[t]he stock of goods held for resale in the regular course of trade of a retail or wholesale business" and "[f]inished goods, goods in process, and raw materials of a manufacturing business purchased from another person." MCL 208.1111(4)(a), (b).

[76] MCL 208.1113(6)(d) through (g).

[77] MCL 208.1203(1).

[78] MCL 205.581, Art II(4).

list of items that includes things such as "gross income derived from business" and "gains derived from dealings in property."[79] 26 CFR § 1.61-1 provides that "[g]ross income includes income realized in any form, whether in money, property, or services." 26 CFR § 1.61-3 further provides that gross income for manufacturing, merchandising, or mining businesses is "the total sales, less the cost of goods sold, plus any income from investments and from incidental or outside operations or sources." Moreover, *Black's Law Dictionary* states that gross income means "[t]otal income from all sources before deductions, exemptions, or other tax reductions."[80]

These definitions of gross income are similar to the definition of gross receipts under the BTA—the entire amount received by the taxpayer as determined from any gainful activity. Like gross income under the Internal Revenue Code, gross receipts are subject to myriad exclusions and deductions. Notably, gross receipts are subject to a reduction for the purchase of inventory during the tax year, including freight, shipping, delivery, or engineering charges included in the original contract price. This is similar to the IRS's definition of "gross income" for manufacturing, merchandising, or mining businesses—total sales less the cost of goods sold.[81] In addition, several of these

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[79] 26 USC 61.

[80] *Black's Law Dictionary* (9th ed), p 831.

[81] "Cost of goods sold" is determined by a taxpayer's inventory. See 33A Am Jur 2d, Federal Taxation, § 6500 ("A taxpayer must use inventories to determine the cost of goods sold if the production, purchase, or sale of merchandise is an income-producing factor."). See also *Thor Power Tool Co v Comm'r of Internal Revenue,* 439 US 522, 530 n 9; 99 S Ct 773; 58 L Ed 2d

exclusions or deductions are not specifically and directly related to particular transactions.[82] Depreciable assets can be assets used over a certain number of years and, thus, not related to a single transaction.[83] Materials and supplies purchased during a tax year can be used at any time for the operation of a business and for any amount of transactions. Finally, the purchase of inventory, which includes such things as goods held for resale or raw materials, some of which can stay in a taxpayer's warehouse for an indeterminate amount of time, can be an expense not specifically or directly related to a particular transaction. [84]

We hold that the MGRT fits within the broad definition of "income tax" under the Compact by taxing a variation of net income—the entire amount received by the taxpayer as determined from any gainful activity minus inventory and certain other deductions that are expenses not specifically and directly related to a particular transaction. Therefore, IBM could elect to use the Compact's apportionment formula for that

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785 (1979); *Hygienic Prods Co v Comm'r of Internal Revenue,* 111 F2d 330, 331 (CA 6, 1940).

[82] While the Compact does not define the phrase "not specifically and directly related to particular transactions," the use of the words "specifically," "directly," and "particular" connotes a close relation to an individual transaction. See *Random House Webster's College Dictionary* (2001). That is, the tax cannot be a tax focusing on specific transactions, i.e., a transactional tax.

[83] See 26 USC 167, 168.

[84] MCL 208.1111(4)(a), (b).

portion of its tax base subject to the MGRT for the 2008 tax year.[85]

VI. CONCLUSION

We conclude that Court of Appeals erred by holding that the BTA repealed the Compact's election provision by implication. Therefore, IBM could elect to use the Compact's apportionment formula during the 2008 tax year. We further hold that IBM could use the Compact's apportionment formula to apportion its MGRT base under the BTA. Accordingly, we reverse the Court of Appeals judgment in favor of the Department, reverse the Court of Claims order granting summary disposition in favor of the Department, and remand to the Court of Claims for entry of an order granting summary disposition in favor of IBM.

David F. Viviano
Michael F. Cavanagh
Stephen J. Markman

[85] Our holding is limited to the determination that the MGRT is included within the Compact definition of "income tax." As noted earlier in note 70, we do not need to reach the issue whether the MGRT, generally, is an income tax.

STATE OF MICHIGAN
SUPREME COURT

No. 146440

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,
Defendant-Appellee.

ZAHRA, J. *(concurring)*.

I agree with the lead opinion's holding that IBM was entitled to use the Compact's elective three-factor apportionment and allocation formula for its 2008 Michigan taxes. I also agree with both the lead opinion and the dissenting opinion that the tax bases at issue here are "income taxes" within the meaning of the Compact. Whether the Legislature repealed the Compact's election provision by implication when it enacted the BTA is a very close question. I would not reach that question because the Legislature made clear that taxpayers are entitled to use the Compact's election provision for the 2008, 2009, and 2010 tax years.

Assuming that the Legislature impliedly repealed the Compact's election provision in 2008 by enacting the BTA, IBM could nonetheless avail itself of the Compact's election provision for tax years 2008 through 2010 because the Legislature, in 2011, clearly intended to provide multistate taxpayers the benefit of the Compact's election provision for these tax years. Specifically, on May 25, 2011, the Legislature necessarily *re-enacted* all the provisions of the Compact, and ordered that act to take immediate effect.[1] MCL 8.3u provides that

> [t]he provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments. If any provision of a law is repealed and in substance re-enacted, a reference in any other law to the repealed provision shall be deemed a reference to the re-enacted provision.

Pursuant to this provision, we must construe the Compact as though it had not been impliedly repealed.[2]

That said, the BTA's exclusive apportionment method remains in conflict with the election provision of the Compact. This conflict, in my view, is easily resolved because the Legislature in 2011 also expressly supplemented the Compact. This new provision is not "the same as those of prior laws" and is a "new enactment," which expressly provides that a taxpayer could elect to apportion its income under article IV of the Compact

> except that beginning January 1, 2011 any taxpayer subject to the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, or the income tax act of 1967, 1967 PA 281,

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[1] 2011 PA 40.

[2] See also 1A Singer, Sutherland Statutory Construction (7th ed), Repeal and Reenactment, § 23:29.

> MCL 206.1 to 206.697, shall, for purposes of that act, apportion and allocate in accordance with the provisions of that act and shall not apportion or allocate in accordance with article IV.[3]

There can be no dispute given this language that the Legislature specifically intended to retroactively repeal the Compact's election provision beginning January 1, 2011. Further, I conclude that this language contemplates that any taxpayer could avail itself of the Compact's election provision for tax years 2008 through 2010. This is because the Legislature, either under the original enactment of the Compact[4] (assuming the Legislature did not repeal the Compact's election provision by implication when it enacted the BTA) or under the above re-enactment and supplementation of the Compact[5] (assuming the Legislature repealed the Compact's election provision by implication when it enacted the BTA), chose to commence its express repeal of the Compact's election provision on January 1, 2011, even though the conflict between the BTA and the Compact had existed from the 2008 tax year. Simply put, the contrapositive of the Compact's supplemental provision must mean that before January 1, 2011, a taxpayer could, "for purposes of that act [the ITA or the BTA], apportion and allocate in accordance with the provisions of [the ITA or the BTA] and [may] apportion or allocate in accordance with article IV" of the Compact. This is, in my opinion, the most reasonable understanding of this legislation.

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[3] 2011 PA 40.

[4] 1969 PA 343.

[5] 2011 PA 40.

In sum, the Legislature in 2011 *created* a window in which it intended the Compact's election provision to apply. In this case, IBM sought to "apportion and allocate" its taxes under the BTA well before January 1, 2011, and therefore may apportion or allocate its taxes in accordance with article IV of the Compact. For this reason, I concur in the result reached in the lead opinion.

Brian K. Zahra

STATE OF MICHIGAN
SUPREME COURT

No. 146440

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Plaintiff-Appellant,

v.

DEPARTMENT OF TREASURY,
Defendant-Appellee.

MCCORMACK, J. *(dissenting).*

I respectfully dissent because I conclude that the Michigan Business Tax Act (BTA), MCL 208.1101 *et seq.,* requires taxpayers to apportion their multistate income in accordance with the BTA's sales-only apportionment formula and without resort to the Multistate Tax Compact's election provision. I reach this result because the Legislature's command—"each tax base established under this act *shall be apportioned in accordance with this chapter,"* MCL 208.1301(1) (emphasis added)—is plain, unambiguous, and permits only one interpretation. Further, there is no constitutional barrier that prevents the Legislature from making the Compact's alternative election provision unavailable to taxpayers. I would affirm the judgment of the Court of Appeals.

I. AN IRRECONCILABLE CONFLICT OF STATUTES

The threshold issue is, at its core, one of statutory interpretation. When the language of a statute is unambiguous, we give effect to its plain meaning. *Ter Beek v City of Wyoming,* 495 Mich 1, 8; 846 NW2d 531 (2014). It is hard to imagine a more unambiguous command than the mandatory directive found in § 301 of the BTA: "Except as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter." MCL 208.1301(1). There is no "otherwise provided" exception in the BTA that would aid IBM in its attempt to avoid the statute's sales-only apportionment requirement. And, within Chapter 208 of the Michigan Compiled Laws, it is the BTA alone that provides the formula by which taxpayers are to apportion their multistate income. See MCL 208.1301(2); MCL 208.1303(1). Neither the Compact nor its apportionment provisions are referred to anywhere in the BTA.

I share the lead opinion's view that we must make every attempt "to construe statutes, claimed to be in conflict, harmoniously[.]" *Wayne Co Prosecutor v Dep't of Corrections,* 451 Mich 569, 577; 548 NW2d 900 (1996).[1] When later enacted legislation irreconcilably

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[1] The lead opinion implies that if the Compact is found to irreconcilably conflict with the BTA, the Compact, as the earlier enacted statute, will necessarily have been repealed by implication. Our caselaw does not demand such a result. See *Metro Life Ins Co v Stoll,* 276 Mich 637, 641; 268 NW 763 (1936) ("It is the rule that where two laws *in pari materia* are in irreconcilable conflict, the one last enacted will control or be regarded as an exception to or qualification of the prior statute.") In any event, regardless of whether the BTA impliedly repealed the Compact beginning January 1, 2008, the issue remains the

conflicts with a prior act, however, "the last expression of the legislative will must control." *Jackson v Mich Corrections Comm,* 313 Mich 352, 356; 21 NW2d 159 (1946).

Section 301(1) of the BTA directs that taxes established under the BTA be apportioned "in accordance with this chapter." "[T]his chapter" requires taxpayers to use a sales-only apportionment formula.[2] The Compact, however, provides that "[a]ny taxpayer subject to an income tax[3]. . . may elect to apportion" its income in accordance with the Compact's three-factor apportionment formula. MCL 205.581, Art III(1). Reading these provisions side by side, I see two, and only two, possible results: either taxes established under the BTA need not be apportioned "in accordance with this chapter," as § 301 demands, or taxpayers may not elect to use the Compact formula to apportion tax bases established under the BTA. While I agree with the lead opinion that statutes that appear to be conflict should be read together and reconciled, if reasonably possible, *Rathbun v State of Michigan,* 284 Mich 521, 544; 280 NW 35 (1938), I disagree that this is a case where reconciliation is possible. The differing opinions offered by this Court here make the underlying conflict undeniably plain. The Compact and the BTA are irreconcilably in conflict; one statute—either

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same—whether the Compact election was available for tax years 2008 through 2010.

[2] Taxpayers may petition the Treasury to use an alternative apportionment method if the apportionment provisions of the BTA "do not fairly represent the extent of the taxpayer's business activity in this state[.]" MCL 208.1309(1).

[3] I agree with the lead opinion that the tax bases at issue here are "income taxes" within the meaning of the Compact. MCL 205.581, Art 11(4).

the Compact or the BTA—must prevail over the other. And neither alternative is easily dismissed. Traditional rules of construction lead me to resolve the conflict in favor of the later enacted and more specific legislation. See *Kalamazoo v KTS Indus, Inc,* 263 Mich App 23, 38-39; 687 NW2d 319 (2004) (resolving a direct conflict between two statutes in favor of the subsequently enacted legislation).

The lead opinion agrees that the plain language of § 301 is mandatory. But it asserts that § 301 can nevertheless be interpreted as permitting taxpayers to make the Compact election. I do not see how this interpretation of the BTA is reasonable. If a taxpayer can elect an alternative apportionment formula, then § 301 is in no sense *mandatory*. Quite the opposite: § 301's mandatory apportionment "in accordance with this chapter" becomes *optional.* By interpreting § 301 as permitting taxpayers to make the Compact election, the lead opinion has not, as it claims, settled on a harmonious construction of the BTA and the Compact. Rather, it has resolved the conflict in favor of the Compact, the *earlier* enacted statute. But our precedent is clear: when an irreconcilable conflict exists, as in this case, the later enacted legislation controls. *Jackson,* 313 Mich at 356; see also *Washtenaw Co Rd Comm'rs v Pub Sery Comm,* 349 Mich 663, 680; 85 NW2d 134 (1957). Because I am not convinced that the two statutes can be read harmoniously, I believe that, for tax years 2008 through 2010, the enactment of the BTA impliedly repealed the Compact's election provision.

The lead opinion tries to give some effect to § 301 by stating that a taxpayer "must use the apportionment formula set forth in" the BTA if it does not make the Compact election. *Ante* at 15. This construction does not make § 301's mandatory directive "mandatory" at all. When a taxpayer is given a choice as to whether they will apportion their income in accordance with the BTA's sales-only formula, the number of alternative options—a single one, or more—is irrelevant. As long as an alternative option exists, the taxpayer may, not must, use the apportionment formula set forth in the BTA. And once the lead opinion's "mandatory" construction is revealed to be anything but that, I do not believe that the lead opinion has persuasively explained *why* the BTA did not impliedly amend or repeal the Compact's election provision. Rather, the lead opinion, relying on the fact that the Legislature has expressly repealed and amended tax statutes in the past, simply states that "[h]ad the Legislature believed that the Compact's election provision no longer had a place in Michigan's tax system . . . , it could have taken the necessary action to eliminate the election provision." *Ante* at 14-15. Because it did not, the lead opinion "proceed[s] under the assumption that the Legislature intended for [the Compact's election provision] to remain in effect." *Ante* at 15. This, of course, simply assumes the lead opinion's conclusion that there was no repeal. Yes, repeals by implication are disfavored, and that the Legislature knows how to affect an express repeal is irrefutable. But by demanding that the Legislature take "the necessary action"—i.e., *expressly* amend or repeal the Compact—the lead opinion has elevated the presumption against implied repeals into an absolute bar.

Having failed to adequately explain why the statutory language itself permits the result it reaches, the lead opinion anchors its analysis in a historical overview of business taxation in Michigan. While informative, I find this approach ultimately unpersuasive. The lead opinion argues that because the Compact was enacted at a time when Michigan law applied the same three-factor apportionment formula as that provided in the Compact, the Legislature, in enacting it, must have anticipated the future enactment of a tax act requiring a different apportionment formula and intended for the Compact to prevail should a conflict arise. But even assuming that the lead opinion is correct, that interpretation reads into the Compact a policy choice by the *1970* Legislature that the *2008* Legislature was free to disagree with, either by enacting an income tax with a different, mandatory apportionment formula, as it did in 2008, or by repealing the election provision outright, as it did in 2011. See *Studier v Mich Pub Sch Employees' Retirement Bd,* 472 Mich 642, 661; 698 NW2d 350 (2005) ("[A] fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature.").

The lead opinion underscores its error by attaching particular significance to 2011 PA 40, which expressly amended the Compact to make the election unavailable to BTA taxpayers beginning January 1, 2011. The effect of this amendment on tax years 2011 and beyond is plain to see, but whether the amendment lends force to IBM's position in *this* dispute is not. In enacting this amendment, the 2011 Legislature may have simply been acting expressly to confirm what the 2007 Legislature believed it had already done implicitly. And even if the 2011 Legislature was expressing its view that the BTA did not, in fact, repeal the election provision, this Court is not bound by the prior Legislature's construction of the earlier enactment. See *Robertson v Baxter,* 57 Mich 127, 132;

23 NW 711 (1885) ("Legislative construction of past legislation has no judicial force except for the future. But it is always entitled to be considered with some care, so far as it throws light on doubtful language, and for future cases it has authority."); *Frey v Mitchie,* 68 Mich 323, 327; 36 NW 184 (1888) ("It is unnecessary to say more than that a legislative interpretation of old laws has no judicial force. Whether right or wrong must be determined by the statutes themselves."). The question we must answer in this case concerns what the Legislature intended when it enacted the BTA—not what it intended when it enacted the Compact forty years earlier or amended it three years later. While in answering this question the 2011 amendment may be considered "with some care, so far as it throws light on doubtful language," *Baxter,* 57 Mich at 132, that light does not shine on the lead opinion's argument.

In my view the BTA made the Compact election unavailable. Because the statutes are irreconcilably in conflict, the latter, as the more specific and later enacted statute, must be given effect over the former. For this reason, I disagree with the lead opinion that the BTA's mandatory directive can be interpreted so as to allow BTA taxpayers to make the Compact election instead. As a result, I find it necessary to address IBM's argument that the Legislature was not constitutionally permitted to make the BTA's sales-only apportionment formula exclusive and mandatory without first repealing the Compact in its entirety.

II. THE LEGISLATURE WAS NOT BARRED FROM UNILATERALLY AMENDING THE COMPACT

IBM asks this Court to invoke the authority of "compact law" and hold that the Legislature, even had it intended to alter the Compact's election provision when it enacted the BTA, was prohibited from doing so.[4] I would decline that invitation.

The United States Constitution provides that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement of Compact with another State[.]" US Const, art I, § 10, cl 3. As the Supreme Court explained in *US Steel Corp v Multistate Tax Comm,* 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), the clause is not to be read strictly, but only as requiring congressional consent for compacts that tend to increase the political power of the states in a way that "may encroach upon or interfere with the just supremacy of the United States." *Id.* at 471 (quotation marks and citation omitted). Those compacts that receive congressional authorization *and* fall within the scope of the Compact Clause are treated as federal law. *Cuyler v Adams,* 449 US 433, 440; 101 S Ct 703; 66 L Ed 2d 641 (1981). Compacts without congressional approval, however, are not transformed into

[4] To the extent that IBM is separately arguing that the Compact is a binding contract among its member states and that unilateral amendment of the Compact offends the Contract Clause, that argument is discussed later in this opinion.

The California First District Court of Appeal recently decided this very issue in *Gillette Co v Franchise Tax Bd,* 209 Cal App 4th 938; 147 Cal Rptr 3d 603 (2012), review granted and opinion superseded sub nom *Gillette v Franchise Tax Bd,* 151 Cal Rptr 3d 106; 291 P3d 327 (2013). The *Gillette* Court held that "under established compact law, the [Multistate Tax] Compact superseded subsequent conflicting state law . . . [and] the federal and state Constitutions prohibit states from passing laws that impair the obligations of contracts." *Gillette,* 147 Cal Rptr 3d at 615. For the reasons stated herein, I believe that *Gillette* was wrongly decided.

federal law; thus their construction is a matter of state statutory law.

Notwithstanding the fact that the Multistate Tax Compact, as a compact without congressional approval, does not carry the supreme force of federal law, IBM believes that the Legislature could not impose an exclusive apportionment formula because the Compact supersedes conflicting state law in any event. This is contrary to our well-established rule that a statute can be amended, repealed, or superseded, in whole or in part, expressly or impliedly, by a subsequently enacted statute. *LeRoux v Secretary of State,* 465 Mich 594, 615; 640 NW2d 849 (2002) ("Absent the creation of contract rights, the later Legislature is free to amend or repeal existing statutory provisions."). The essence of IBM's argument is that because a compact is an agreement between Michigan and the other member states, it is not like any other state law subject to traditional principles of statutory construction, but rather it has some greater force and authority. As a result, any variation from the Compact's twins is strictly prohibited. In support of this proposition, IBM cites as persuasive authority *McComb v Wambaugh,* 934 F2d 474, 479 (CA 3, 1991), and *CT Hellmuth & Assoc, Inc v Washington Metro Area Transit Auth,* 414 F Supp 408, 409 (D Md, 1976). Neither case, in my view, supports such a rule.

In *McComb,* the plaintiff, as guardian ad litem for a minor child, brought a suit against the city of Philadelphia and its employees under 42 USC 1983. The suit sought damages for injuries the child suffered as a result of parental abuse. Before he was injured the child was under the protective custody of a Virginia court. The Virginia court ordered that the child be returned to his parental home in Philadelphia, where the abuse occurred. Plaintiff argued that the Virginia court order, in conjunction with the Interstate Compact for Placement of Children (ICPC), a compact to which Pennsylvania and Virginia are parties that had not been congressionally approved, extended the jurisdiction of the Virginia court into Pennsylvania and thereby imposed a legal duty on the Philadelphia social workers. The United States Court of Appeals for the Third Circuit rejected this argument, ultimately concluding that the ICPC did not apply when a child is returned by the sending state to a natural parent residing in another state. *McComb,* 934 F2d at 482.

IBM cites the Third Circuit's discussion of the scope of the ICPC for its argument here:

> Because Congressional consent was neither given nor required, the [ICPC] does not express federal law. Consequently, this Compact must be construed as state law. . . .
>
> Nevertheless, uniformity of interpretation is important in the construction of a Compact because in some contexts it is a contract between the participating states. *Having entered into a contract, a participant state may not unilaterally change its terms. A Compact also takes precedence over statutory law in member states. [McComb,* 934 F2d at 479 (citations omitted; emphasis added).]

The *McComb* court did not cite any authority for the above emphasized rule that—compacts without congressional approval cannot be unilaterally amended and must take precedent over conflicting state law—and I have found none. Moreover, the unsupported statement contradicts the one that precedes it. Either the compact must be construed as state law or it must be construed as something with greater authority than state law, but the *McComb* court said both. Finally, this statement was dictum, because the court did not identify any potential conflict between the ICPC and Pennsylvania law and the court ultimately determined that the ICPC did not apply. *Id.* at 482.

In *CT Hellmuth,* the plaintiff sought to compel disclosure of documents under Maryland law. The defendant, an interstate agency formed by an interstate compact between Maryland, Virginia, and the District of Columbia, argued that its status as an interstate agency exempted it from the Maryland law. In granting the defendant's motion for summary judgment, the court remarked that

> when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties. It, therefore, appears settled that one party may not enact legislation which would impose burdens upon the compact absent the concurrence of the other signatories. [*CT Hellmuth,* 414 F Supp at 409.]

CT Hellmuth and the cases it relied upon, however, involved congressionally approved compacts, which, as explained, supersede subsequent state law by virtue of the Supremacy Clause. *Cuyler,* 449 US at 440.

IBM's claim that the Compact trumps the BTA simply because of its status as a compact relies on the faulty premise that the distinction between compacts that have congressional approval and those that do not is unimportant, and that *all* compacts are immune to unilateral modification by their member states because "[a] Compact . . . takes precedence over statutory law in member states." *McComb,* 934 F2d at 479. This assumes too much. Any immunity, if it exists, is a result of a compact's dual nature as both state law and a contract among its member states. See *Green v Biddle,* 21 US (8 Wheat) 1; 5 L Ed 547 (1832) (recognizing that an interstate compact can be a contract). As a result the Legislature is free to amend or repeal an existing statutory provision *as long as it does not impair a contractual obligation. LeRoux,* 465 Mich at 615; see US Const, art I, § 10, cl 1; Const 1963, art 1, § 10. In other words, the Legislature is prohibited from unilaterally amending the Compact only if that amendment impairs contractual obligations created by the Compact itself. When viewed as a matter of *contract* law, I believe that it was within the Legislature's power to require BTA taxpayers to apportion their multistate income solely in accordance with § 301.

III. UNILATERAL AMENDMENT OF MCL 205.581, ART III(2) DOES NOT VIOLATE THE STATE OR FEDERAL CONTRACTS CLAUSE

In evaluating whether § 301 of the. BTA unconstitutionally impairs a contract, the threshold question is whether the Compact did, in fact, create a contractual relationship in the first instance. I do not believe that it did. Two factors weigh heavily in this conclusion. First, the member states' courses of conduct indicate that there is no contractual obligation to strictly adhere to Articles III and IV of the Compact. Second, the Compact is silent regarding a member state's authority to enact exclusive apportionment formulas that differ from the Compact's formula.

Starting with the obvious: taxpayers like IBM were *not* parties to the Compact. To the extent that the Compact can be viewed as a contract, it is an agreement between its member states, not between taxpayers and the states.[5] The Compact member states' courses of performance are critical to understanding the nature of the agreement. As the Supreme Court recently explained, a party's course of performance is "highly significant" evidence of the party's understanding of the Compact's terms. *Tarrant Regional Water Dist v Hermann,* ___US___; 133 S Ct 2120, 2135; 186 L Ed 2d 153 (2013) (citation and quotation marks omitted).[6] Here, it is plain that the member states did *not* view strict adherence to Articles III and IV as a binding contractual obligation, as Compact members have deviated from the Compact's election provision and apportionment formula without objection from other members. Arkansas, for example, has retained the Compact's election provision but changed the Compact formula to place additional emphasis on the sales factor. Ark Code 26-5-101, Art IV(9). Non-deviating members have not pursued actions against those states that have deviated, and no member state has intervened on IBM's behalf in this case. Further, the Multistate Tax Commission—the organization charged with administering the Compact—has urged us to reject IBM's rigid interpretation of the Compact. These facts weigh heavily in favor of rejecting IBM's argument that the Compact creates a binding

[5] While the Treasury has not made the argument in its brief on appeal, it is not entirely clear to me why IBM has standing to enforce the Compact *as a contract,* given that IBM is neither a party to the Compact nor is it clear that they were intended as a third-party beneficiary. See *Schmalfeldt v North Pointe Ins Co,* 469 Mich 422; 670 NW2d 651 (2003); MCL 600.1405. In any event, because I conclude that no such contractual relationship was fanned, I find it unnecessary to address this issue *sua sponte.*

[6] Michigan law recognizes a similar principle. See *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 478-479; 663 NW2d 447 (2003).

contractual obligation on its member states to refrain from amending the election provision.[7]

Deference to principles of state sovereignty leads me to the same conclusion. As this Court explained in *Studier,* 472 Mich at 661, there is a "strong presumption that statutes do not create contractual rights." This presumption is grounded in the principle that "surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments." *Id.* IBM has not overcome this presumption here. The Compact's silence on the effect of a member state's ability to elect an exclusive apportionment formula indicates that Michigan did not contract away its right to do exactly that. *Id.* at 662. While it is true that the Compact does not expressly allow Michigan to adopt a different apportionment formula, neither does the Compact surrender the state's right to do so. When the state's sovereign power of taxation is implicated, as it is here, any uncertainty should be resolved in favor of concluding that the state did *not* cede that power. See *Tarrant,* 133 S Ct at 2132 (recognizing that states "do not easily cede their sovereign powers"). Admittedly, any sovereignty concerns are abated by the fact that a member state may withdraw from the Compact, unilaterally and without repercussion, at any time. MCL 205.581, Art X(2). But this withdrawal provision is equally strong evidence that the member

[7] It bears emphasizing that Compact members have not only refrained from bringing legal action against one another for deviating from Articles III and IV, they have endorsed the Commissioner's interpretation of the Compact: in the *Gillette* litigation, all of the member states jointly filed an amicus brief urging the Supreme Court of California to reject the lower court's construction of the Compact as a binding contract.

states did not intend to be contractually bound, as it demonstrates the member states' desire to retain control over their sovereignty with respect to taxation. Moreover, if continued participation in the Compact is, essentially, completely voluntary, I fail to see how its terms can be construed as creating binding contractual obligations, especially in light of the presumption against such an interpretation. *Studier,* 472 Mich at 661.[8]

IV. CONCLUSION

I would affirm the judgment of the Court of Appeals because the Legislature expressly provided that taxes established under the BTA "shall be in accordance with" the BTA's sales-only apportionment formula. Allowing taxpayers to apportion their multistate income in accordance with the Compact's formula violates this unambiguous directive. And because the state was not contractually obligated to allow taxpayers to make the Compact election, the BTA does not offend the state or federal constitutions.

Bridget M. McCormack
Robert P. Young, Jr.
Mary Beth Kelly

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[8] In arguing that unilateral amendment of the Compact would offend the state and federal constitutions, IBM cites *Green,* 21 US 1, in which the Supreme Court analyzed an interstate compact under the Contract Clause, US Const, art I, § 10, cl 1. While I conclude that the Compact did not create a contractual obligation that precluded Michigan from unilaterally ainending its election provision, it is important to note that the Supreme Court has since retreated from the "any deviation" standard it applied in *Green.* See *US Trust Co v New Jersey,* 431 US 1, 21; 97 S Ct 1505; 52 L Ed 2d 92 (1977). Because IBM does not engage these *post-Green* developments, it has failed to explain how a constitutional violation arises under a modern analysis.

APPENDIX I

Act No. 282
Public Acts of 2014
Approved by the Governor
September 11, 2014

Filed with the Secretary of State
September 12, 2014

EFFECTIVE DATE: September 12, 2014

STATE OF MICHIGAN
97TH LEGISLATURE
REGULAR SESSION OF 2014

Introduced by Senators Jansen and Hildenbrand

ENROLLED SENATE BILL No. 156

AN ACT to amend 2007 PA 36, entitled "An act to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, reporting, payment, and enforcement of taxes on certain commercial, business, and financial activities; to prescribe the powers and duties of public officers and state departments; to provide for the inspection of certain taxpayer records; to provide for interest and penalties; to provide exemptions, credits, and refunds; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and to make appropriations," by amending sections 111, 305, 403, and 433 (MCL 208.1111, 208.1305, 208.1403, and 208.1433), sections 111 and 305 as amended by 2012 PA 605, section 403 as amended by 2008 PA 434, and section 433 as amended by 2007 PA 215, and by adding section 508; and to repeal acts and parts of acts.

The People of the State of Michigan enact:

Sec. 111. (1) "Gross receipts" means the entire amount received by the taxpayer as determined by using the taxpayer's method of accounting used for federal income tax purposes, less any amount deducted as bad debt for federal income tax purposes that corresponds to items of gross receipts included in the modified gross receipts tax base for the current tax year or a past tax year phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter, from any activity whether in intrastate, interstate, or foreign commerce carried on for direct or indirect gain, benefit, or advantage to the taxpayer or to others except for the following:

(a) Proceeds from sales by a principal that the taxpayer collects in an agency capacity solely on behalf of the principal and delivers to the principal.

(b) Amounts received by the taxpayer as an agent solely on behalf of the principal that are expended by the taxpayer for any of the following:

(i) The performance of a service by a third party for the benefit of the principal that is required by law to be performed by a licensed person.

(ii) The performance of a service by a third party for the benefit of the principal that the taxpayer has not undertaken a contractual duty to perform.

(iii) 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.

(iv) A capital asset of a type that is, or under the internal revenue code 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.

(v) Property not described under subparagraph (iv) that is purchased by the taxpayer on behalf of the principal and that the taxpayer does not take title to or use in the course of performing its contractual business activities.

(vi) Fees, taxes, assessments, levies, fines, penalties, or other payments established by law that are paid to a governmental entity and that are the legal obligation of the principal.

(c) Amounts that are excluded from gross income of a foreign corporation engaged in the international operation of aircraft under section 883(a) of the internal revenue code.

(d) Amounts received by an advertising agency used to acquire advertising media time, space, production, or talent on behalf of another person.

(e) Amounts received by a newspaper to acquire advertising space not owned by that newspaper in another newspaper on behalf of another person. This subdivision does not apply to any consideration received by the taxpayer for acquiring that advertising space.

(f) Notwithstanding any other provision of this section, amounts received by a taxpayer that manages real property owned by a third party that are deposited into a separate account kept in the name of that third party and that are not reimbursements to the taxpayer and are not indirect payments for management services that the taxpayer provides to that third party.

(g) Proceeds from the taxpayer's transfer of an account receivable if the sale that generated the account receivable was included in gross receipts for federal income tax purposes. This subdivision does not apply to a taxpayer that during the tax year both buys and sells any receivables.

(h) Proceeds from any of the following:

(i) The original issue of stock or equity instruments or equity issued by a regulated investment company as that term is defined under section 851 of the internal revenue code.

(ii) The original issue of debt instruments. (i) Refunds from returned merchandise.

(j) Cash and in-kind discounts.

(k) Trade discounts.

(l) Federal, state, or local tax refunds.

(m) Security deposits.

(n) Payment of the principal portion of loans.

(o) Value of property received in a like-kind exchange.

(p) Proceeds from a sale, transaction, exchange, involuntary conversion, maturity, redemption, repurchase, recapitalization, or other disposition or reorganization of tangible, intangible, or real property, less any gain from the disposition or reorganization to the extent that the gain is included in the taxpayer's federal taxable income, if the property satisfies 1 or more of the following:

(i) The property is a capital asset as defined in section 1221(a) of the internal revenue code.

(ii) The property is land that qualifies as property used in the trade or business as defined in section 1231(b) of the internal revenue code.

(iii) The property is used in a hedging transaction entered into by the taxpayer in the normal course of the taxpayer's trade or business primarily to manage the risk of exposure to foreign currency fluctuations that affect assets, liabilities, profits, losses, equity, or investments in foreign operations; interest rate fluctuations; or commodity price fluctuations. For purposes of this subparagraph, the actual transfer of title of real or tangible personal property to another person is not a hedging transaction. Only the overall net gain from the hedging transactions entered into during the tax year is included in gross receipts. As used in this subparagraph, "hedging transaction" means that term as defined under section 1221 of the internal revenue code regardless of whether the transaction was identified by the taxpayer as a hedge for federal income tax purposes, provided, however, that transactions excluded under this subparagraph and not identified as a hedge for federal income tax purposes shall be identifiable to the department by the taxpayer as a hedge in its books and records.

(iv) The property is investment and trading assets managed as part of the person's treasury function. For purposes of this subparagraph, a person principally engaged in the trade or business of purchasing and selling investment and trading assets is not performing a treasury function. Only the overall net gain from the treasury function incurred during the tax year is included in gross receipts. As used in this subparagraph, "treasury function" means the pooling and management of investment and trading assets for the purpose of satisfying the cash flow or liquidity needs of the taxpayer's trade or business.

(q) The proceeds from a policy of insurance, a settlement of a claim, or a judgment in a civil action less any proceeds under this subdivision that are included in federal taxable income.

(r) For a sales finance company, as defined in section 2 of the motor vehicle sales finance act, 1950 (Ex Sess) PA 27, MCL 492.102, and directly or indirectly owned in whole or in part by a motor vehicle manufacturer as of January 1, 2008, and for a person that is a broker or dealer as defined under section 78c(a)(4) or (5) of the securities exchange act of 1934, 15 USC 78c, or a person included in the unitary business group of that broker or dealer that buys and sells for its own account, contracts that are subject to the commodity exchange act, 7 USC 1 to 27f, amounts realized from the repayment, maturity, sale, or redemption of the principal of a loan, bond, or mutual fund, certificate of deposit, or similar marketable instrument provided such instruments are not held as inventory.

(s) For a sales finance company, as defined in section 2 of the motor vehicle sales finance act, 1950 (Ex Sess) PA 27, MCL 492.102, and directly or indirectly owned in whole or in part by a motor vehicle manufacturer as of January 1, 2008, and for a person that is a broker or dealer as defined under section 78c(a)(4) or (5) of the securities exchange act of 1934, 15 USC 78c, or a person included in the unitary business group of that broker or dealer that buys and sells for its own account, contracts that are subject to the commodity exchange act, 7 USC 1 to 27f, the principal amount received under a repurchase agreement or other transaction properly characterized as a loan.

(t) For a mortgage company, proceeds representing the principal balance of loans transferred or sold in the tax year. For purposes of this subdivision, "mortgage company" means a person that is licensed under the mortgage brokers, lenders, and servicers licensing act, 1987 PA 173, MCL 445.1651 to 445.1684, or the secondary mortgage loan act, 1981 PA 125, MCL 493.51 to 493.81, and has greater than 90% of its revenues, in the ordinary course of business, from the origination, sale, or servicing of residential mortgage loans.

(u) For a professional employer organization, any amount charged by a professional employer organization that represents the actual cost of wages and salaries, benefits, worker's compensation, payroll taxes, withholding, or other assessments paid to or on behalf of a covered employee by the professional employer organization under a professional employer arrangement.

(v) Any invoiced items used to provide more favorable floor plan assistance to a person subject to the tax imposed under this act than to a person not subject to this tax and paid by a manufacturer, distributor, or supplier.

(w) For an individual, estate, or person organized for estate or gift planning purposes, amounts received other than those from transactions, activities, and sources in the regular course of the person's trade or business. For purposes of this subdivision, all of the following apply:

(i) Amounts received from transactions, activities, and sources in the regular course of the person's business include, but are not limited to, the following:

(A) Receipts from tangible and intangible property if the acquisition, rental, lease, management, or disposition of the property constitutes integral parts of the person's regular trade or business operations.

(B) Receipts received in the course of the person's trade or business from stock and securities of any foreign or domestic corporation and dividend and interest income.

(C) Receipts derived from isolated sales, leases, assignments, licenses, divisions, or other infrequently occurring dispositions, transfers, or transactions involving tangible, intangible, or real property if the property is or was used in the person's trade or business operation.

(D) Receipts derived from the sale of an interest in a business that constitutes an integral part of the person's regular trade or business.

(E) Receipts derived from the lease or rental of real property.

(ii) Receipts excluded from gross receipts include, but are not limited to, the following:

(A) Receipts derived from investment activity, including interest, dividends, royalties, and gains from an investment portfolio or retirement account, if the investment activity is not part of the person's trade or business.

(B) Receipts derived from the disposition of tangible, intangible, or real property held for personal use and enjoyment, such as a personal residence or personal assets.

(x) Receipts derived from investment activity other than receipts from transactions, activities, and sources in the regular course of the person's trade or business by a person that is organized exclusively to conduct investment activity and that does not conduct investment activity for any person other than an individual or a person related to that individual or by a common trust fund established under the collective investment funds act, 1941 PA 174, MCL 555.101 to 555.113. For purposes of this subdivision, a person is related to an individual if that person is a spouse, brother or sister, whether of the whole or half blood or by adoption, ancestor, lineal descendent of that individual or related person, or a trust benefiting that individual or 1 or more persons related to that individual.

(y) Interest income and dividends derived from obligations or securities of the United States government, this state, or any governmental unit of this state. As used in this subdivision, "governmental unit" means that term as defined in section 3 of the shared credit rating act, 1985 PA 227, MCL 141.1053.

(z) Dividends and royalties received or deemed received from a foreign operating entity or a person other than a United States person, including, but not limited to, the amounts determined under section 78 of the internal revenue code and sections 951 to 964 of the internal revenue code, phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter.

(aa) To the extent not deducted as purchases from other firms under section 203, each of the following:

(i) Sales or use taxes collected from or reimbursed by a consumer or other taxes the taxpayer collected directly from or was reimbursed by a purchaser and remitted to a local, state, or federal tax authority, phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter.

(ii) In the case of receipts from the sale of cigarettes or tobacco products by a wholesale dealer, retail dealer, distributor, manufacturer, or seller, an amount equal to the federal and state excise taxes paid by any person on or for such cigarettes or tobacco products under subtitle E of the internal revenue code or other applicable state law, phased in over a 3-year period starting with 60% of that amount in the 2008 tax year, 75% in the 2009 tax year, and 100% in the 2010 tax year and each tax year thereafter.

(iii) In the case of receipts from the sale of motor fuel by a person with a motor fuel tax license or a retail dealer, an amount equal to federal and state excise taxes paid by any person on such motor fuel under section 4081 of the internal revenue code or under other applicable state law, phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter.

(iv) In the case of receipts from the sale of beer, wine, or intoxicating liquor by a person holding a license to sell, distribute, or produce those products, an amount equal to federal and state excise taxes paid by any person on or for such beer, wine, or intoxicating liquor under subtitle E of the internal revenue code or other applicable state law, phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter.

(v) In the case of receipts from the sale of communication, video, internet access and related services and equipment, any government imposed tax, fee, or other imposition in the nature of a tax or fee required by law, ordinance, regulation, ruling, or other legal authority and authorized to be charged on a customer's bill or invoice, phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter. This subparagraph does not include the recovery of net income taxes, net worth taxes, property taxes, or the tax imposed under this act.

(vi) In the case of receipts from the sale of electricity, natural gas, or other energy source, any government imposed tax, fee, or other imposition in the nature of a tax or fee required by law, ordinance, regulation, ruling, or other legal authority and authorized to be charged on a customer's bill or invoice, phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter. This subparagraph does not include the recovery of net income taxes, net worth taxes, property taxes, or the tax imposed under this act.

(vii) Any deposit required under any of the following, phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter:

(A) 1976 IL 1, MCL 445.571 to 445.576.

(B) R 436.1629 of the Michigan administrative code.

(C) R 436.1723a of the Michigan administrative code.

(D) Any substantially similar beverage container deposit law of another state.

(viii) An excise tax collected pursuant to the airport parking tax act, 1987 PA 248, MCL 207.371 to 207.383, collected from or reimbursed by a consumer and remitted as provided in the airport parking tax act, 1987 PA 248, MCL 207.371 to 207.383, phased in over a 5-year period starting with 50% of that amount in the 2008 tax year, 60% in the 2009 tax year, 60% in the 2010 tax year, 75% in the 2011 tax year, and 100% in the 2012 tax year and each tax year thereafter.

(bb) Amounts attributable to an ownership interest in a pass-through entity, regulated investment company, real estate investment trust, or cooperative corporation whose business activities are taxable under section 203 or would be subject to the tax under section 203 if the business activities were in this state. For purposes of this subdivision:

(i) "Cooperative corporation" means those organizations described under subchapter T of the internal revenue code.

(ii) "Pass-through" entity means a partnership, subchapter S corporation, or other person, other than an individual, that is not classified for federal income tax purposes as an association taxed as a corporation.

(iii) "Real estate investment trust" means that term as defined under section 856 of the internal revenue code.

(iv) "Regulated investment company" means that term as defined under section 851 of the internal revenue code.

(cc) For a regulated investment company as that term is defined under section 851 of the internal revenue code, receipts derived from investment activity by that regulated investment company.

(dd) For fiscal years that begin after September 30, 2009, unless the state budget director certifies to the state treasurer by January 1 of that fiscal year that the federally certified rates for actuarial soundness required under 42 CFR 438.6 and that are specifically developed for Michigan's health maintenance organizations that hold a contract with this state for medicaid services provide explicit adjustment for their obligations required for payment of the tax under this act, amounts received by the taxpayer during that fiscal year for medicaid premium or reimbursement of costs associated with service provided to a medicaid recipient or beneficiary.

(ee) For a taxpayer that provides health care management consulting services, amounts received by the taxpayer as fees from its clients that are expended by the taxpayer to reimburse those clients for labor and nonlabor services that are paid by the client and reimbursed to the client pursuant to a services agreement.

(ff) Amounts attributed to the taxpayer pursuant to a discharge of indebtedness as described under section 61(a)(12) of the internal revenue code, including forgiveness of a nonrecourse debt.

(2) "Insurance company" means an authorized insurer as defined in sections 106 and 108 of the insurance code of 1956, 1956 PA 218, MCL 500.106 and 500.108.

(3) "Internal revenue code" means the United States internal revenue code of 1986 in effect on January 1, 2008 or, at the option of the taxpayer, in effect for the tax year.

(4) "Inventory" means, except as provided in subdivision (e), all of the following:

(a) The stock of goods held for resale in the regular course of trade of a retail or wholesale business, including electricity or natural gas purchased for resale.

(b) Finished goods, goods in process, and raw materials of a manufacturing business purchased from another person.

(c) For a person that is a new motor vehicle dealer licensed under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, floor plan interest expenses for new motor vehicles. For purposes of this subdivision, "floor plan interest" means interest paid that finances any part of the person's purchase of new motor vehicle inventory from a manufacturer, distributor, or supplier. However, amounts attributable to any invoiced items used to provide more favorable floor plan assistance to a person subject to the tax imposed under this act than to a person not subject to this tax is considered interest paid by a manufacturer, distributor, or supplier.

(d) For a person that is a securities trader, broker, or dealer or a person included in the unitary business group of that securities trader, broker, or dealer that buys and sells for its own account, contracts that are subject to the commodity exchange act, 7 USC 1 to 27f, the cost of securities as defined under section 475(c)(2) of the internal revenue code and for a securities trader the cost of commodities as defined under section 475(e)(2) and for a broker or dealer the cost of commodities as defined under section 475(e)(2)(B), (C), and (D) of the internal revenue code, excluding interest expense other than interest expense related to repurchase agreements. As used in this subdivision:

(i) "Broker" means that term as defined under section 78c(a)(4) of the securities exchange act of 1934, 15 USC 78c.

(ii) "Dealer" means that term as defined under section 78c(a)(5) of the securities exchange act of 1934, 15 USC 78c.

(iii) "Securities trader" means a person that engages in the trade or business of purchasing and selling investments and trading assets.

(e) Inventory does not include either of the following:

(i) Personal property under lease or principally intended for lease rather than sale.

(ii) Property allowed a deduction or allowance for depreciation or depletion under the internal revenue code.

(5) "Officer" means an officer of a corporation other than a subchapter S corporation, including all of the following:

(a) The chairperson of the board.

(b) The president, vice president, secretary, or treasurer of the corporation or board.

(c) Persons performing similar duties and responsibilities to persons described in subdivisions (a) and (b) that include, at a minimum, major decision making.

Sec. 305. (1) Sales of the taxpayer in this state are determined as follows:

(a) Sales of tangible personal property are in this state if the property is shipped or delivered, or, in the case of electricity and gas, the contract requires the property to be shipped or delivered, to any purchaser within this state based on the ultimate destination at the point that the property comes to rest regardless of the free on board point or other conditions of the sales. Property stored in transit for 60 days or more prior to receipt by the purchaser or the purchaser's designee, or in the case of a dock sale not picked up for 60 days or more, is deemed to have come to rest at this ultimate destination. Property stored in transit for fewer than 60 days prior to receipt by the purchaser or the purchaser's designee, or in the case of a dock sale picked up before 60 days, is not deemed to have come to rest at this ultimate destination. For purposes of this subdivision:

(i) "Dock sale" means a sale in which the purchaser uses its own or rented vehicles, or makes arrangements with a carrier, to pick up the property at the seller's location.

(ii) "Stored in transit" means storing, staging, forwarding, or consolidating activities undertaken for further shipment or transfer of the property to the purchaser or purchaser's designee.

(b) Receipts from the sale, lease, rental, or licensing of real property are in this state if that property is located in this state.

(c) Receipts from the lease or rental of tangible personal property are sales in this state to the extent that the property is utilized in this state. The extent of utilization of tangible personal property in this state is determined by multiplying the receipts by a fraction, the numerator of which is the number of days of physical location of the property in this state during the lease or rental period in the tax year and the denominator of which is the number of days of physical location of the property everywhere during all lease or rental periods in the tax year. If the physical location of the property during the lease or rental period is unknown or cannot be determined, the tangible personal property is utilized in the state in which the property was located at the time the lease or rental payer obtained possession.

(d) Receipts from the lease or rental of mobile transportation property owned by the taxpayer are in this state to the extent that the property is used in this state. The extent an aircraft will be deemed to be used in this state and the amount of receipts that is to be included in the numerator of this state's sales factor is determined by multiplying all the receipts from the lease or rental of the aircraft by a fraction, the numerator of the fraction is the number of landings of the aircraft in this state and the denominator of the fraction is the total number of landings of the aircraft. If the extent of the use of any transportation property within this state cannot be determined, then the receipts are in this state if the property has its principal base of operations in this state.

(e) Royalties and other income received for the use of or for the privilege of using intangible property, including patents, know-how, formulas, designs, processes, patterns, copyrights, trade names, service names, franchises, licenses, contracts, customer lists, computer software, or similar items, are attributed to the state in which the property is used by the purchaser. If the property is used in more than 1 state, the royalties or other income shall be apportioned to this state pro rata according to the portion of use in this state. If the portion of use in this state cannot be determined, the royalties or other income shall be excluded from both the numerator and the denominator. Intangible property is used in this state if the purchaser uses the intangible property or the rights to the intangible property in the regular course of its business operations in this state, regardless of the location of the purchaser's customers.

(2) Sales from the performance of services are in this state and attributable to this state as follows:

(a) Except as otherwise provided in this section, all receipts from the performance of services are included in the numerator of the apportionment factor if the recipient of the services receives all of the benefit of the services in this state. If the recipient of the services receives some of the benefit of the services in this state, the receipts are included in the numerator of the apportionment factor in proportion to the extent that the recipient receives benefit of the services in this state.

(b) Sales derived from securities brokerage services attributable to this state are determined by multiplying the total dollar amount of receipts from securities brokerage services by a fraction, the numerator of which is the sales of securities brokerage services to customers within this state, and the denominator of which is the sales of securities brokerage services to all customers. Receipts from securities brokerage services include commissions on transactions, the spread earned on principal transactions in which the broker buys or sells from its account, total margin interest paid on behalf of brokerage accounts owned by the broker's customers, and fees and receipts of all kinds from the underwriting of securities. If receipts from brokerage services can be associated with a particular customer, but it is impractical to associate the receipts with the address of the customer, then the address of the customer shall be presumed to be the address of the branch office that generates the transactions for the customer.

(c) Sales of services that are derived directly or indirectly from the sale of management, distribution, administration, or securities brokerage services to, or on behalf of, a regulated investment company or its beneficial owners, including receipts derived directly or indirectly from trustees, sponsors, or participants of employee benefit plans that have accounts in a regulated investment company, shall be attributable to this state to the extent that the shareholders of the regulated investment company are domiciled within this state. For purposes of this subdivision, "domicile" means the shareholder's mailing address on the records of the regulated investment company. If the regulated investment company or the person providing management services to the regulated investment company has actual knowledge that the shareholder's primary residence or principal place of business is different than the shareholder's mailing address, then the shareholder's primary residence or principal place of business is the shareholder's domicile. A separate computation shall be made with respect to the receipts derived from each regulated investment company. The total amount of sales attributable to this state shall be equal to the total receipts received by each regulated investment company multiplied by a fraction determined as follows:

(i) The numerator of the fraction is the average of the sum of the beginning-of-year and end-of-year number of shares owned by the regulated investment company shareholders who have their domicile in this state.

(ii) The denominator of the fraction is the average of the sum of the beginning-of-year and end-of-year number of shares owned by all shareholders.

(iii) For purposes of the fraction, the year shall be the tax year of the regulated investment company that ends with or within the tax year of the taxpayer.

(3) Receipts from the origination of a loan or gains from the sale of a loan secured by residential real property is deemed a sale in this state only if 1 or more of the following apply:

(a) The real property is located in this state.

(b) The real property is located both within this state and 1 or more other states and more than 50% of the fair market value of the real property is located within this state.

(c) More than 50% of the real property is not located in any 1 state and the borrower is located in this state.

(4) Interest from loans secured by real property is in this state if the property is located within this state or if the property is located both within this state and 1 or more other states, if more than 50% of the fair market value of the real property is located within this state, or if more than 50% of the fair market value of the real property is not located within any 1 state, if the borrower is located in this state. The determination of whether the real property securing a loan is located within this state shall be made as of the time the original agreement was made and any and all subsequent substitutions of collateral shall be disregarded.

(5) Interest from a loan not secured by real property is in this state if the borrower is located in this state.

(6) Gains from the sale of a loan not secured by real property, including income recorded under the coupon stripping rules of section 1286 of the internal revenue code, are in this state if the borrower is in this state.

(7) Receipts from credit card receivables, including interest, fees, and penalties from credit card receivables and receipts from fees charged to cardholders, such as annual fees, are in this state if the billing address of the cardholder is in this state.

(8) Receipts from the sale of credit card or other receivables is in this state if the billing address of the customer is in this state. Credit card issuer's reimbursements fees are in this state if the billing address of the cardholder is in this state. Receipts from merchant discounts, computed net of any cardholder chargebacks, but not reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its cardholders, are in this state if the commercial domicile of the merchant is in this state.

(9) Loan servicing fees derived from loans of another secured by real property are in this state if the real property is located in this state, or the real property is located both within and outside of this state and 1 or more states if more than 50% of the fair market value of the real property is located in this state, or more than 50% of the fair market value of the real property is not located in any 1 state, and the borrower is located in this state. Loan servicing fees derived from loans of another not secured by real property are in this state if the borrower is located in this state. If the location of the security cannot be determined, then loan servicing fees for servicing either the secured or the unsecured loans of another are in this state if the lender to whom the loan servicing service is provided is located in this state.

(10) Receipts from the sale of securities and other assets from investment and trading activities, including, but not limited to, interest, dividends, and gains are in this state in either of the following circumstances:

(a) The person's customer is in this state.

(b) If the location of the person's customer cannot be determined, both of the following:

(i) Interest, dividends, and other income from investment assets and activities and from trading assets and activities, including, but not limited to, investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options; futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions are in this state if the average value of the assets is assigned to a regular place of business of the taxpayer within this state. Interest from federal funds sold and purchased and from securities purchased under resale agreements and securities sold under repurchase agreements are in this state if the average value of the assets is assigned to a regular place of business of the taxpayer within this state. The amount of receipts and other income from investment assets and activities is in this state if assets are assigned to a regular place of business of the taxpayer within this state.

(ii) The amount of receipts from trading assets and activities, including, but not limited to, assets and activities in the matched book, in the arbitrage book, and foreign currency transactions, but excluding amounts otherwise sourced in this section, are in this state if the assets are assigned to a regular place of business of the taxpayer within this state.

(11) Receipts from transportation services rendered by a person subject to tax in another state are in this state and shall be attributable to this state as follows:

(a) Except as otherwise provided in subdivisions (b) through (e), receipts shall be proportioned based on the ratio that revenue miles of the person in this state bear to the revenue miles of the person everywhere.

(b) Receipts from maritime transportation services shall be attributable to this state as follows:

(i) 50% of those receipts that either originate or terminate in this state.

(ii) 100% of those receipts that both originate and terminate in this state.

(c) Receipts attributable to this state of a person whose business activity consists of the transportation both of property and of individuals shall be proportioned based on the total gross receipts for passenger miles and ton mile fractions, separately computed and individually weighted by the ratio of gross receipts from passenger transportation to total gross receipts from all transportation, and by the ratio of gross receipts from freight transportation to total gross receipts from all transportation, respectively.

(d) Receipts attributable to this state of a person whose business activity consists of the transportation of oil by pipeline shall be proportioned based on the ratio that the gross receipts for the barrel miles transported in this state bear to the gross receipts for the barrel miles transported by the person everywhere.

(e) Receipts attributable to this state of a person whose business activities consist of the transportation of gas by pipeline shall be proportioned based on the ratio that the gross receipts for the 1,000 cubic feet miles transported in this state bear to the gross receipts for the 1,000 cubic feet miles transported by the person everywhere.

(12) For purposes of subsection (11), if a taxpayer can show that revenue mile information is not available or cannot be obtained without unreasonable expense to the taxpayer, receipts attributable to this state shall be that portion of the revenue derived from transportation services everywhere performed that the miles of transportation services performed in this state bears to the miles of transportation services performed everywhere. If the department determines that the information required for the calculations under subsection (11) are not available or cannot be obtained without unreasonable expense to the taxpayer, the department may use other available information that in the opinion of the department will result in an equitable allocation of the taxpayer's receipts to this state.

(13) Except as provided in subsections (14) through (19), receipts from the sale of telecommunications service or mobile telecommunications service are in this state if the customer's place of primary use of the service is in this state. As used in this subsection, "place of primary use" means the customer's residential street address or primary business street address where the customer's use of the telecommunications service primarily occurs. For mobile telecommunications service, the customer's residential street address or primary business street address is the place of primary use only if it is within the licensed service area of the customer's home service provider.

(14) Receipts from the sale of telecommunications service sold on an individual call-by-call basis are in this state if either of the following applies:

(a) The call both originates and terminates in this state.

(b) The call either originates or terminates in this state and the service address is located in this state.

(15) Receipts from the sale of postpaid telecommunications service are in this state if the origination point of the telecommunication signal, as first identified by the service provider's telecommunication system or as identified by information received by the seller from its service provider if the system used to transport telecommunication signals is not the seller's, is located in this state.

(16) Receipts from the sale of prepaid telecommunications service or prepaid mobile telecommunications service are in this state if the purchaser obtains the prepaid card or similar means of conveyance at a location in this state. Receipts from recharging a prepaid telecommunications service or mobile telecommunications service is in this state if the purchaser's billing information indicates a location in this state.

(17) Receipts from the sale of private communication services are in this state as follows:

(a) 100% of the receipts from the sale of each channel termination point within this state.

(b) 100% of the receipts from the sale of the total channel mileage between each termination point within this state.

(c) 50% of the receipts from the sale of service segments for a channel between 2 customer channel termination points, 1 of which is located in this state and the other is located outside of this state, which segments are separately charged.

(d) The receipts from the sale of service for segments with a channel termination point located in this state and in 2 or more other states or equivalent jurisdictions, and which segments are not separately billed, are in this state based on a percentage determined by dividing the number of customer channel termination points in this state by the total number of customer channel termination points.

(18) Receipts from the sale of billing services and ancillary services for telecommunications service are in this state based on the location of the purchaser's customers. If the location of the purchaser's customers is not known or cannot be determined, the sale of billing services and ancillary services for telecommunications service are in this state based on the location of the purchaser.

(19) Receipts to access a carrier's network or from the sale of telecommunications services for resale are in this state as follows:

(a) 100% of the receipts from access fees attributable to intrastate telecommunications service that both originates and terminates in this state.

(b) 50% of the receipts from access fees attributable to interstate telecommunications service if the interstate call either originates or terminates in this state.

(c) 100% of the receipts from interstate end user access line charges, if the customer's service address is in this state. As used in this subdivision, "interstate end user access line charges" includes, but is not limited to, the surcharge approved by the federal communications commission and levied pursuant to 47 CFR 69.

(d) Gross receipts from sales of telecommunications services to other telecommunication service providers for resale shall be sourced to this state using the apportionment concepts used for non-resale receipts of telecommunications services if the information is readily available to make that determination. If the information is not readily available, then the taxpayer may use any other reasonable and consistent method.

(20) Except as otherwise provided under this subsection, for a taxpayer whose business activities include live radio or television programming as described in subsector code 7922 of industry group 792 under the standard industrial classification code as compiled by the United States department of labor or are included in industry group 483, 484, 781, or 782 under the standard industrial classification code as compiled by the United States department of labor, or any combination of the business activities included in those groups, media receipts are in this state and attributable to this state only if the commercial domicile of the customer is in this state and the customer has a direct connection or relationship with the taxpayer pursuant to a contract under which the media receipts are derived. For media receipts from the sale of advertising, if the customer of that advertising is commercially domiciled in this state and receives some of the benefit of the sale of that advertising in this state, the media receipts from the advertising to that customer are included in the numerator of the apportionment factor in proportion to the extent that the customer receives the benefit of

the advertising in this state. For purposes of this subsection, if the taxpayer is a broadcaster and if the customer receives some of the benefit of the advertising in this state, the media receipts for that sale of advertising from that customer shall be proportioned based on the ratio that the broadcaster's viewing or listening audience in this state bears to its total viewing or listening audience everywhere. As used in this subsection:

(a) "Media property" means motion pictures, television programs, internet programs and websites, other audiovisual works, and any other similar property embodying words, ideas, concepts, images, or sound without regard to the means or methods of distribution or the medium in which the property is embodied.

(b) "Media receipts" means receipts from the sale, license, broadcast, transmission, distribution, exhibition, or other use of media property and receipts from the sale of media services. Media receipts do not include receipts from the sale of media property that is a consumer product that is ultimately sold at retail.

(c) "Media services" means services in which the use of the media property is integral to the performance of those services.

(21) Terms used in subsections (13) through (20) have the same meaning as those terms defined in the streamlined sales and use tax agreement administered under the streamlined sales and use tax administration act, 2004 PA 174, MCL 205.801 to 205.833.

(22) For purposes of this section, a borrower is considered located in this state if the borrower's billing address is in this state.

Sec. 403. (1) Notwithstanding any other provision in this act, the credits provided in this section shall be taken before any other credit under this act. Except as otherwise provided in subsection (6), for the 2008 tax year, the total combined credit allowed under this section shall not exceed 50% of the tax liability imposed under this act before the imposition and levy of the surcharge under section 281. For the 2009 tax year and each tax year after 2009, the total combined credit allowed under this section shall not exceed 52% of the tax liability imposed under this act before the imposition and levy of the surcharge under section 281.

(2) Subject to the limitation in subsection (1), for the 2008 tax year a taxpayer may claim a credit against the tax imposed by this act equal to 0.296% of the taxpayer's compensation in this state. For the 2009 tax year and each tax year after 2009, subject to the limitation in subsection (1), a taxpayer may claim a credit against the tax imposed by this act equal to 0.370% of the taxpayer's compensation in this state. For purposes of this subsection, a taxpayer includes a person subject to the tax imposed under chapter 2A and a person subject to the tax imposed under chapter 2B. A professional employer organization shall not include payments by the professional employer organization to the officers and employees of a client of the professional employer organization whose employment operations are managed by the professional employer organization. A client may include payments by the professional employer organization to the officers and employees of the client whose employment operations

are managed by the professional employer organization.

(3) Subject to the limitation in subsection (1), for the 2008 tax year a taxpayer may claim a credit against the tax imposed by this act equal to 2.32% multiplied by the result of subtracting the sum of the amounts calculated under subdivisions (d), (e), and (f) from the sum of the amounts calculated under subdivisions (a), (b), and (c). Subject to the limitation in subsection (1), for the 2009 tax year and each tax year after 2009, a taxpayer may claim a credit against the tax imposed by this act equal to 2.9% multiplied by the result of subtracting the sum of the amounts calculated under subdivisions (d), (e), and (f) from the sum of the amounts calculated under subdivisions (a), (b), and (c):

(a) Calculate the cost, including fabrication and installation, paid or accrued in the taxable year of tangible assets of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes, provided that the assets are physically located in this state for use in a business activity in this state and are not mobile tangible assets.

(b) Calculate the cost, including fabrication and installation, paid or accrued in the taxable year of mobile tangible assets of a type that are, or under the internal revenue code will become, eligible for depreciation, amortization, or accelerated capital cost recovery for federal income tax purposes. This amount shall be multiplied by the apportionment factor for the tax year as prescribed in chapter 3.

(c) For tangible assets, other than mobile tangible assets, purchased or acquired for use outside of this state in a tax year beginning after December 31, 2007 and subsequently transferred into this state and purchased or acquired for use in a business activity, calculate the federal basis used for determining gain or loss as of the date the tangible assets were physically located in this state for use in a business activity plus the cost of fabrication and installation of the tangible assets in this state.

(d) If the cost of tangible assets described in subdivision (a) was paid or accrued in a tax year beginning after December 31, 2007, or before December 31, 2007 to the extent the credit is used and at the rate at which the credit was used under former 1975 PA 228 or to the extent the credit was used, and at the rate at which the credit was used under this act, calculate the gross proceeds or benefit derived from the sale or other disposition of the tangible assets minus the gain, multiplied by the apportionment factor for the taxable year as prescribed in chapter 3, and plus the loss, multiplied by the apportionment factor for the taxable year as prescribed in chapter 3 from the sale or other disposition reflected in federal taxable income.

(e) If the cost of mobile tangible assets described in subdivision (b) was paid or accrued in a tax year beginning after December 31, 2007, or before December 31, 2007 to the extent the credit is used and at the rate at which the credit was used under former 1975 PA 228 or to the extent the credit was used, and at the rate at which the credit was used under this act, calculate the gross proceeds or benefit derived from the sale or other disposition of the mobile tangible assets minus the gain and plus the loss from the sale or other disposition reflected in federal taxable income. This amount shall be multiplied by the apportionment factor for the tax year as prescribed in chapter 3.

(f) For assets purchased or acquired in a tax year beginning after December 31, 2007, or before December 31, 2007 to the extent the credit is used and at the rate at which the credit was used under former 1975 PA 228 or to the extent the credit was used, and at the rate at which the credit was used under this act, that were eligible for a credit under subdivision (a) or (c) and that were transferred out of this state, calculate the federal basis used for determining gain or loss as of the date of the transfer. For purposes of this subdivision, "transferred out of this state" means removal from this state of tangible assets, other than mobile tangible assets, by means other than sale or other disposition.

(4) For a tax year in which the amount of the credit calculated under subsection (3) is negative, the absolute value of that amount is added to the taxpayer's tax liability for the tax year.

(5) A taxpayer that claims a credit under this section is not prohibited from claiming a credit under section 405. However, the taxpayer shall not claim a credit under this section and section 405 based on the same costs and expenses.

(6) For a taxpayer primarily engaged in furnishing electric and gas utility service that makes capital investments in electric and gas distribution assets for which a portion of the credit provided under subsection (3) would be denied for the 2008 tax year by reason of the 50% limitation of subsection (1), the 50%

limitation on the total combined credit for the 2008 tax year provided in subsection (1) shall be increased by an amount not to exceed the lesser of the amount of the denied credit or 50% of the tax increase under this act accrued for financial reporting purposes due to the elimination of the deduction under section 168(k) of the internal revenue code by 2008 PA 434. Provided, however, that the total combined credit allowed under this section for the 2008 tax year shall not exceed 80% of the tax liability imposed under this act after the imposition and levy of the surcharge under section 281.

Sec. 433. (1) A taxpayer that is a business located and conducting business activity within a renaissance zone may claim a credit against the tax imposed by this act for the tax year to the extent and for the duration provided pursuant to the Michigan renaissance zone act, 1996 PA 376, MCL 125.2681 to 125.2696, as follows:

(a) Except as otherwise provided under subdivision (b), for a taxpayer located and conducting business activity in a renaissance zone after November 30, 2002, a credit equal to the lesser of the following:

(i) The tax liability attributable to business activity conducted within a renaissance zone in the tax year.

(ii) Ten percent of adjusted services performed in a designated renaissance zone.

(b) For a taxpayer located and conducting business activity in a renaissance zone before December 1, 2002, a credit equal to the greater of the following:

(i) The amount calculated under subdivision (a)(i) or (ii), whichever is less.

(ii) The product of the following:

(A) The credit claimed under section 39b of former 1975 PA 228 for the tax year ending in 2007.

(B) The ratio of the taxpayer's payroll in this state in the tax year divided by the taxpayer's payroll in this state in its tax year ending in 2007 under former 1975 PA 228.

(C) The ratio of the taxpayer's renaissance zone business activity factor for the tax year divided by the taxpayer's renaissance zone business activity factor for its tax year ending in 2007 under section 39b of former 1975 PA 228.

(2) Any portion of the taxpayer's tax liability that is attributable to illegal activity conducted in the renaissance zone shall not be used to calculate a credit under this section.

(3) The credit allowed under this section continues through the tax year in which the renaissance zone designation expires.

(4) If the amount of the credit allowed under this section exceeds the tax liability of the taxpayer for the tax year, that portion of the credit that exceeds the tax liability shall not be refunded.

(5) A taxpayer that claims a credit under this section shall not employ, pay a speaker fee to, or provide any remuneration, compensation, or consideration to any person employed by the state, the state administrative board created in 1921 PA 2, MCL 17.1 to 17.3, or the renaissance zone review board created

in section 5 of the renaissance zone act, 1996 PA 376, MCL 125.2685, whose employment relates or related in any way to the authorization or enforcement of the credit allowed under this section for any year in which the taxpayer claims a credit under this section and for the 3 years after the last year that a credit is claimed.

(6) To be eligible for the credit allowed under this section, an otherwise qualified taxpayer shall file an annual return under this act in a format determined by the department.

(7) Any portion of the taxpayer's tax liability that is attributable to business activity related to the operation of a casino, and business activity that is associated or affiliated with the operation of a casino, including, but not limited to, the operation of a parking lot, hotel, motel, or retail store, shall not be used to calculate a credit under this section.

(8) For purposes of this section, taxpayer includes a person subject to the tax imposed under chapter 2A and a person subject to the tax imposed under chapter 2B.

(9) As used in this section:

(a) "Adjusted services performed in a designated renaissance zone" means either of the following:

(i) Except as provided in subparagraph (ii), the sum of the taxpayer's payroll for services performed in a designated renaissance zone plus an amount equal to the amount deducted in arriving at federal taxable income for the tax year for depreciation, amortization, or immediate or accelerated write-off for tangible property exempt under section 7ff of the general property tax act, 1893 PA 206, MCL 211.7ff, in the tax year or, for new property, in the immediately following tax year.

(ii) For a partnership, limited liability company, S corporation, or individual, the amount determined under subparagraph (i) plus the product of the following as related to the taxpayer if greater than zero:

(A) Business income.

(B) The ratio of the taxpayer's total sales in this state during the tax year divided by the taxpayer's total sales everywhere during the tax year.

(C) The renaissance zone business activity factor.

(b) "Casino" means a casino regulated by this state pursuant to the Michigan gaming control and revenue act, 1996 IL 1, MCL 432.201 to 432.226.

(c) "New property" means property that has not been subject to, or exempt from, the collection of taxes under the general property tax act, 1893 PA 206, MCL 211.1 to 211.155, and has not been subject to, or exempt from, ad valorem property taxes levied in another state, except that receiving an exemption as inventory property does not disqualify property.

(d) "Payroll" means total salaries and wages before deducting any personal or dependency exemptions.

(e) "Renaissance zone" means that term as defined in the Michigan renaissance zone act, 1996 PA 376, MCL 125.2681 to 125.2696.

(f) "Renaissance zone business activity factor" means a fraction, the numerator of which is the ratio of the average value of the taxpayer's property located in a designated renaissance zone to the average value of the taxpayer's property in this state plus the ratio of the taxpayer's payroll for services performed in a designated renaissance zone to all of the taxpayer's payroll in this state and the denominator of which is 2.

(g) "Tax liability attributable to business activity conducted within a renaissance zone" means the taxpayer's tax liability multiplied by the renaissance zone business activity factor.

Sec. 508. (1) If, as a result of the changes enacted by the amendatory act that added this section, a taxpayer has an overpayment of tax for any tax year beginning after December 31, 2009 through the tax year beginning after December 31, 2013, the taxpayer shall, in accordance with sections 27a and 30 of 1941 PA 122, MCL 205.27a and 205.30, file a claim for a refund, on or after January 1, 2015 but no later than December 31, 2015, using a form, process, or format as prescribed by the department. A claim filed pursuant to this section is limited to the determination of any tax liability and any overpayment resulting from the changes enacted by the amendatory act that added this section. Interest shall be calculated in accordance with section 23 of 1941 PA 122, MCL 205.23. Any refund paid under this section shall be paid in equal annual payments over 6 years beginning in 2016.

(2) Notwithstanding section 21(6) and (7) of 1941 PA 122, MCL 205.21, and the statute of limitations period prescribed under section 27a(2) of 1941 PA 122, MCL 205.27a, the department may assess a taxpayer that claimed a refund pursuant to this section for any

amount determined after audit or investigation to have exceeded the proper and correct amount of overpayment resulting from the changes enacted by the amendatory act that added this section. The assessment issued under this subsection shall not be issued more than 4 years after the date the taxpayer filed its claim under this section and shall be limited to the changes enacted by the amendatory act that added this section.

(3) There is appropriated to the department for the 2014-2015 state fiscal year the sum of $1,000,000.00 to begin implementing the requirements of the amendatory act that added this section. Any portion of this amount under this section that is not expended in the 2014-2015 state fiscal year shall not lapse to the general fund but shall be carried forward in a work project account that is in compliance with section 451a of the management and budget act, 1984 PA 431, MCL 18.1451a, for the following state fiscal year.

Enacting section 1. 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA

343, MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713.

Enacting section 2. This amendatory act is retroactive and is effective for tax years beginning on and after January 1, 2010.

This act is ordered to take immediate effect.

/s/ Illegible
Secretary of the Senate

/s/ Illegible
Clerk of the House of Representatives

Approved________________

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Governor

APPENDIX J

Act No. 40
Public Acts of 2011
Approved by the Governor
May 25, 2011

Filed with the Secretary of State
May 25, 2011

EFFECTIVE DATE: May 25, 2011

STATE OF MICHIGAN
96TH LEGISLATURE

REGULAR SESSION OF 2011

Introduced by Rep. Gilbert

ENROLLED HOUSE BILL No. 4479

AN ACT to amend 1969 PA 343, entitled "An act to adopt a multistate tax compact to facilitate and promote convenient, uniform, nonduplicative and proper determination of state and local tax liability of multistate taxpayers," by amending section 1 (MCL 205.581).

The People of the State of Michigan enact:

Sec. 1. The multistate tax compact is enacted into law and entered into with all jurisdictions legally joining therein, in the form substantially as follows:

MULTISTATE TAX COMPACT

Article I. Purposes.

The purposes of this compact are to:

(1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

(2) Promote uniformity or compatibility in significant components of tax systems.

(3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

(4) Avoid duplicative taxation.

Article II. Definitions.

As used in this compact:

(1) "State" means a state of the United States, the district of Columbia, the commonwealth of Puerto Rico, or any territory or possession of the United States.

(2) "Subdivision" means any governmental unit or special district of a state.

(3) "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than 1 state.

(4) "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, 1 or more forms of which expenses are not specifically and directly related to particular transactions.

(5) "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

(6) "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

(7) "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by state or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

(8) "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

(9) "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of article IX of this compact shall apply only in respect to determinations pursuant to article IV.

Article III. Elements of Income Tax Laws.

Taxpayer Option, State and Local Taxes.

(1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income

in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV except that beginning January 1, 2011 any taxpayer subject to the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, or the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.697, shall, for purposes of that act, apportion and allocate in accordance with the provisions of that act and shall not apportion or allocate in accordance with article IV. This election for any tax year may be made in all party states or subdivisions thereof or in any one or more of the party states or subdivisions thereof without reference to the election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from state taxes and the apportionment and allocation also may be applied to the entire tax base. In no instance wherein article IV is employed for all subdivisions of a state may the sum of all apportionments and allocations to subdivisions within a state be greater than the apportionment and allocation that would be assignable to that state if the apportionment or allocation were being made with respect to a state income tax.

Taxpayer Option, Short Form.

(2) Each party state or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return, whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the state or subdivision, is not in excess of $100,000.00 may elect to report and pay any tax due on the basis of

a percentage of such volume, and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The multistate tax commission, not more than once in 5 years, may adjust the $100,000.00 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the commission, shall replace the $100,000.00 figure specifically provided herein. Each party state and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.

(3) Nothing in this article relates to the reporting or payment of any tax other than an income tax.

Article IV. Division of Income.

(1) As used in this article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipe line, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a federal, state or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this article.

(h) "State" means any state of the United States, the district of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(i) "This state" means the state in which the relevant tax return is filed or, in the case of application of this article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

(2) Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial organization or public utility or the rendering of purely personal

services by an individual, shall allocate and apportion his net income as provided in this article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this article, the taxpayer may elect to allocate and apportion his entire net income as provided in this article.

(3) For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

(4) Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this article.

(5) (a) Net rents and royalties from real property located in this state are allocable to this state.

(b) Net rents and royalties from tangible personal property are allocable to this state: (1) If and to the extent that the property is utilized in this state, or (2) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(c) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(6) (a) Capital gains and losses from sales of real property located in this state are allocable to this state.

(b) Capital gains and losses from sales of tangible personal property are allocable to this state if (1) the property had a situs in this state at the time of the sale, or (2) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

(7) Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

(8) (a) Patent and copyright royalties are allocable to this state: (1) if and to the extent that the patent or copyright is utilized by the payer in this state, or (2) if and to the extent that the patent copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(b) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(9) 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.

(10) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

(11) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by

the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(12) The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(13) The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

(14) Compensation is paid in this state if:

(a) The individual's service is performed entirely within the state;

(b) The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(c) Some of the service is performed in the state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(15) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

(16) Sales of tangible personal property are in this state if:

(a) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.

(17) Sales, other than sales of tangible personal property, are in this state if:

(a) The income-producing activity is performed in this state; or

(b) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

(18) If the allocation and apportionment provisions of this article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) Separate accounting;

(b) The exclusion of any one or more of the factors;

(c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws.

Tax Credit.

(1) Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Tax Credit

Exemption Certificates, Vendors May Rely.

(2) Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate state or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission.

Organization and Management.

(1) (a) The multistate tax commission is hereby established. It shall be composed of 1 "member" from each party state who shall be the head of the state agency charged with the administration of the types of taxes to which this compact applies. If there is more than 1 such agency, the state shall provide by law for the selection of the commission member from the heads of the relevant agencies. State law may provide

that a member of the commission be represented by an alternate but only if there is on file with the commission written notification of the designation and identity of the alternate. The attorney general of each party state or his designee, or other counsel if the laws of the party state specifically provide, shall be entitled to attend the meetings of the commission, but shall not vote. Such attorneys general, designees, or other counsel shall receive all notices of meetings required under paragraph 1 (e) of this article.

(b) Each party state shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the commission member from that state.

(c) Each member shall be entitled to 1 vote. The commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The commission shall adopt an official seal to be used as it may provide.

(e) The commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its executive committee may determine. The commission bylaws shall specify the dates of the annual and any other regular meetings, and shall provide for the giving of notice of annual, regular and special meetings. Notices of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The commission shall elect annually, from among its members, a chairman, a vice chairman and a treasurer. The commission shall appoint an executive director who shall serve at its pleasure, and it shall fix his duties and compensation. The executive director shall be secretary of the commission. The commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party state, the executive director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the commission and shall fix their duties and compensation. The commission bylaws shall provide for personnel policies and programs.

(h) The commission may borrow, accept or contract for the services of personnel from any state, the United States, or any other governmental entity.

(i) The commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The commission may establish 1 or more offices for the transacting of its business.

(k) The commission shall adopt bylaws for the conduct of its business. The commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party states.

(l) The commission annually shall make to the governor and legislature of each party state a report covering its activities for the preceding year. Any donation or grant accepted by the commission or services borrowed shall be reported in the annual report of the commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The commission may make additional reports as it may deem desirable.

Committees.

(2) (a) To assist in the conduct of its business when the full commission is not meeting, the commission shall have an executive committee of 7 members, including the chairman, vice chairman, treasurer and 4 other members elected annually by the commission. The executive committee, subject to the provisions of this compact and consistent with the policies of the commission, shall function as provided in the bylaws of the commission.

(b) The commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the commission, including problems of special interest to any party state and problems dealing with particular types of taxes.

(c) The commission may establish such additional committees as its bylaws may provide.

Powers.

(3) In addition to powers conferred elsewhere in this compact, the commission shall have power to:

(a) Study state and local tax systems and particular types of state and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

Finance.

(4) (a) The commission shall submit to the governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

(b) Each of the commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party states. The total amount of appropriations requested under any such budget shall be apportioned among the party states as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party state and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the commission shall employ such available public sources of information as, in its judgment, present the most equitable and accurate comparisons among the party states. Each of the commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The commission shall not pledge the credit of any party state. The commission may meet any of its obligations in whole or in part with funds available to it under paragraph (1) (i) of this article: provided that the commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the commission makes use of funds available to it under paragraph (1) (i), the commission shall not incur any obligation prior to the allotment of funds by the party states adequate to meet the same.

(d) The commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the commission.

(e) The accounts of the commission shall be open at any reasonable time for inspection by duly constituted officers of the party states and by any persons authorized by the commission.

(f) Nothing contained in this article shall be construed to prevent commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the commission.

Article VII. Uniform Regulations and Forms.

(1) Whenever any 2 or more party states, or subdivisions of party states, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The commission may also act with respect to the provisions of article IV of this compact.

(2) Prior to the adoption of any regulation, the commission shall:

(a) As provided in its bylaws, hold at least 1 public hearing on due notice to all affected party states and subdivisions thereof and to all taxpayers and other persons who have made timely request of the commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party states and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the commission.

(3) The commission shall submit any regulations adopted by it to the appropriate officials of all party states and subdivisions to which they might apply. Each such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits.

(1) This article shall be in force only in those party states that specifically provide therefor by statute.

(2) Any party state or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the commission to perform the audit on its behalf. In responding to the request, the commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The commission may enter into agreements with party states or their subdivisions for assistance in performance of the audit. The commission shall make charges, to be paid by the state or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

(3) The commission may require the attendance of any person within the state where it is conducting an audit or part thereof at a time and place fixed by it within such state for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the commission within the state of which he is a resident: provided that such state has adopted this article.

(4) The commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this article and any and all such courts shall have jurisdiction to

issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a state that has adopted this article.

(5) The commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission.

(6) Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

(7) Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the

party states or any of their subdivisions are not superseded or invalidated by this article.

(8) In no event shall the commission make any charge against a taxpayer for an audit.

(9) As used in this article, "tax," in addition to the meaning ascribed to it in article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration.

(1) Whenever the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this article in effect, notwithstanding the provisions of article VII.

(2) The commission shall select and maintain an arbitration panel composed of officers and employees of state and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

(3) Whenever a taxpayer who has elected to employ article IV, or whenever the laws of the party state or subdivision thereof are substantially identical with the relevant provisions of article IV, the taxpayer, by written notice to the commission and to each party state or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the state or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by 2 or more party states or subdivisions thereof. Each party state

and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

(4) The arbitration board shall be composed of 1 person selected by the taxpayer, 1 by the agency or agencies involved, and 1 member of the commission's arbitration panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the arbitration panel. The 2 persons selected for the board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the arbitration panel. No member of a board selected by lot shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

(5) The board may sit in any state or subdivision party to the proceeding, in the state of the taxpayer's incorporation, residence or domicile, in any state where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

(6) The board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The board shall act by majority vote.

(7) The board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the board. In case of failure to obey a subpoena, and upon application by the board, any judge of a court of competent jurisdiction of the state in which the board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt. The provisions of this paragraph apply only in states that have adopted this article.

(8) Unless the parties otherwise agree the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the board in such manner as it may determine. The commission shall fix a schedule of compensation for members of arbitration boards and of other allowable expenses and costs. No officer or employee of a state or local government who serves as a member of a board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such board member shall be entitled to expenses.

(9) The board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

(10) The board shall file with the commission and with each tax agency represented in the proceeding: the determination of the board; the board's written statement of its reasons therefor; the record of the

board's proceedings; and any other documents required by the arbitration rules of the commission to be filed.

(11) The commission shall publish the determinations of boards together with the statements of the reasons therefor.

(12) The commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party states.

(13) Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceeding.

Article X. Entry Into Force and Withdrawal.

(1) This compact shall enter into force when enacted into law by any 7 states. Thereafter, this compact shall become effective as to any other state upon its enactment thereof. The commission shall arrange for notification of all party states whenever there is a new enactment of the compact.

(2) Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

(3) No proceeding commenced before an arbitration board prior to the withdrawal of a state and to which the withdrawing state or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws
and Jurisdiction.

Nothing in this compact shall be construed to:

(a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement article III (2) of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: provided that the definition of "tax" in article VIII (9) may apply for the purposes of that article and the commission's powers of study and recommendation pursuant to article VI (3) may apply.

(c) Withdraw or limit the jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Serverability.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters.

This act is ordered to take immediate effect.

/s/ [Illegible]
Clerk of the House of Representatives

/s/ [Illegible]
Secretary of the Senate

Approved_______________

____
Governor

APPENDIX K

HOUSE BILL No. 6351

July 28, 2010, Introduced by Rep. Ebli and referred to the Committee on Tax Policy.

A bill to amend 1969 PA 343, entitled

> "An act to adopt a multistate tax compact to facilitate and promote convenient, uniform, nonduplicative and proper determination of state and local tax liability of multistate taxpayers,"

by amending section 1 (MCL 205.581).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. The multistate tax compact is enacted into law and entered into with all jurisdictions legally joining therein, in the form substantially as follows:

MULTISTATE TAX COMPACT

Article I. Purposes.

The purposes of this compact are to:

(1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

(2) Promote uniformity or compatibility in significant components of tax systems.

(3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

(4) Avoid duplicative taxation.

Article II. Definitions.

As used in this compact:

(1) "State" means a state of the United States, the district of Columbia, the commonwealth of Puerto Rico, or any territory or possession of the United States.

(2) "Subdivision" means any governmental unit or special district of a state.

(3) "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than 1 state.

(4) "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, 1 or more forms of which expenses are not specifically and directly related to particular transactions.

(5) "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

(6) "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

(7) "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by state or local law to be separately stated from the sales price by the seller,

or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

(8) "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

(9) "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of article IX of this compact shall apply only in respect to determinations pursuant to article IV.

Article III. Elements of Income Tax Laws.

Taxpayer Option, State and Local Taxes.

(1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV EXCEPT THAT ANY TAXPAYER SUBJECT TO THE MICHIGAN BUSINESS TAX ACT, 2007 PA 36, MCL 208.1101 TO 208.1601, SHALL, FOR PURPOSES OF

THAT ACT, APPORTION AND ALLOCATE IN ACCORDANCE WITH THE PROVISIONS OF THAT ACT AND SHALL NOT APPORTION OR ALLOCATE IN ACCORDANCE WITH ARTICLE IV. This election for any tax year may be made in all party states or subdivisions thereof or in any one or more of the party states or subdivisions thereof without reference to the election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from state taxes and the apportionment and allocation also may be applied to the entire tax base. In no instance wherein article IV is employed for all subdivisions of a state may the sum of all apportionments and allocations to subdivisions within a state be greater than the apportionment and allocation that would be assignable to that state if the apportionment or allocation were being made with respect to a state income tax.

Taxpayer Option, Short Form.

(2) Each party state or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return, whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the state or subdivision, is not in excess of $100,000.00 may elect to report and pay any tax due on the basis of a percentage of such volume, and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The multistate tax commission, not more than once in 5 years, may adjust the $100,000.00 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the commission, shall

replace the $100,000.00 figure specifically provided herein. Each party state and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.

(3) Nothing in this article relates to the reporting or payment of any tax other than an income tax.

Article IV. Division of Income.

(1) As used in this article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipe line, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a federal, state or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this article.

(h) "State" means any state of the United States, the district of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(i) "This state" means the state in which the relevant tax return is filed or, in the case of application of this article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

(2) Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this article, the taxpayer may elect

to allocate and apportion his entire net income as provided in this article.

(3) For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

(4) Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this article.

(5) (a) Net rents and royalties from real property located in this state are allocable to this state.

(b) Net rents and royalties from tangible personal property are allocable to this state: (1) If and to the extent that the property is utilized in this state, or (2) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(c) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(6) (a) Capital gains and losses from sales of real property located in this state are allocable to this state.

(b) Capital gains and losses from sales of tangible personal property are allocable to this state if (1) the property had a situs in this state at the time of the sale, or (2) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

(7) Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

(8) (a) Patent and copyright royalties are allocable to this state: (1) if and to the extent that the patent or copyright is utilized by the payer in this state, or (2) if and to the extent that the patent copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(b) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented productis produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(9) 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.

(10) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

(11) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(12) The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the tax administrator may

require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(13) The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

(14) Compensation is paid in this state if:

(a) The individual's service is performed entirely within the state;

(b) The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(c) Some of the service is performed in the state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(15) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

(16) Sales of tangible personal property are in this state if:

(a) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.

(17) Sales, other than sales of tangible personal property, are in this state if:

(a) The income-producing activity is performed in this state; or

(b) The income-producing activity is performed both in and outside this state and a greater proportion of the income- producing activity is performed in this state than in any other state, based on costs of performance.

(18) If the allocation and apportionment provisions of this article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) Separate accounting;

(b) The exclusion of any one or more of the factors;

(c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws.

Tax Credit.

(1) Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of the credit shall then be applied against the amount of any use tax due a subdivision.

Tax Credit

Exemption Certificates, Vendors May Rely.

(2) Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate state or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission.

Organization and Management.

(1) (a) The multistate tax commission is hereby established. It shall be composed of 1 "member" from each party state who shall be the head of the state agency charged with the administration of the types of taxes to which this compact applies. If there is more than 1 such agency, the state shall provide by law for the selection of the commission member from the

heads of the relevant agencies. State law may provide that a member of the commission be represented by an alternate but only if there is on file with the commission written notification of the designation and identity of the alternate. The attorney general of each party state or his designee, or other counsel if the laws of the party state specifically provide, shall be entitled to attend the meetings of the commission, but shall not vote. Such attorneys general, designees, or other counsel shall receive all notices of meetings required under paragraph 1 (e) of this article.

(b) Each party state shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the commission member from that state.

(c) Each member shall be entitled to 1 vote. The commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The commission shall adopt an official seal to be used as it may provide.

(e) The commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its executive committee may determine. The commission bylaws shall specify the dates of the annual and any other regular meetings, and shall provide for the giving of notice of annual, regular and special meetings. Notices of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The commission shall elect annually, from among its members, a chairman, a vice chairman and a treasurer. The commission shall appoint an executive director who shall serve at its pleasure, and it shall fix his duties and compensation. The executive director shall be secretary of the commission. The commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party state, the executive director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the commission and shall fix their duties and compensation. The commission bylaws shall provide for personnel policies and programs.

(h) The commission may borrow, accept or contract for the services of personnel from any state, the United States, or any other governmental entity.

(i) The commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The commission may establish 1 or more offices for the transacting of its business.

(k) The commission shall adopt bylaws for the conduct of its business. The commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party states.

(l) The commission annually shall make to the governor and legislature of each party state a report covering its activities for the preceding year. Any donation or grant accepted by the commission or services borrowed shall be reported in the annual report of the commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The commission may make additional reports as it may deem desirable.

Committees.

(2) (a) To assist in the conduct of its business when the full commission is not meeting, the commission shall have an executive committee of 7 members, including the chairman, vice chairman, treasurer and 4 other members elected annually by the commission. The executive committee, subject to the provisions of this compact and consistent with the policies of the commission, shall function as provided in the bylaws of the commission.

(b) The commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the commission, including problems of special interest to any party state and problems dealing with particular types of taxes.

(c) The commission may establish such additional committees as its bylaws may provide.

Powers.

(3) In addition to powers conferred elsewhere in this compact, the commission shall have power to:

(a) Study state and local tax systems and particular types of state and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

Finance.

(4) (a) The commission shall submit to the governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

(b) Each of the commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party states. The total amount of appropriations requested under any such budget shall be apportioned among the party states as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party state and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the commission shall employ such available public sources of information as, in its judgment, present the most equitable and accurate comparisons among the party states. Each of the commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The commission shall not pledge the credit of any party state. The commission may meet any of its obligations in whole or in part with funds available to it under paragraph (1) (i) of this article: provided that the commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the commission makes use of funds available to it under paragraph (1) (i), the commission shall not incur any obligation prior to the allotment of funds by the party states adequate to meet the same.

(d) The commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the commission.

(e) The accounts of the commission shall be open at any reasonable time for inspection by duly constituted officers of the party states and by any persons authorized by the commission.

(f) Nothing contained in this article shall be construed to prevent commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the commission.

Article VII. Uniform Regulations and Forms.

(1) Whenever any 2 or more party states, or subdivisions of party states, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the commission may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The commission may also act with respect to the provisions of article IV of this compact.

(2) Prior to the adoption of any regulation, the commission shall:

(a) As provided in its bylaws, hold at least 1 public hearing on due notice to all affected party states and subdivisions thereof and to all taxpayers and other persons who have made timely request of the commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party states and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the commission.

(3) The commission shall submit any regulations adopted by it to the appropriate officials of all party states and subdivisions to which they might apply. Each such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits.

(1) This article shall be in force only in those party states that specifically provide therefor by statute.

(2) Any party state or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the commission to perform the audit on its behalf. In responding to the request, the commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and other documents and any relevant property or stock of merchandise. The commission may enter into agreements with party states or their subdivisions for assistance in performance of the audit. The commission shall make charges, to be paid by the state or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

(3) The commission may require the attendance of any person within the state where it is conducting an audit or part thereof at a time and place fixed by it within such state for the purpose of giving testimony with respect to any account, book, paper, document, other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the commission within the state of which he is a resident: provided that such state has adopted this article.

(4) The commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this article and any and all such courts shall have jurisdiction to

issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this paragraph apply only to courts in a state that has adopted this article.

(5) The commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission.

(6) Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

(7) Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party

states or any of their subdivisions are not superseded or invalidated by this article.

(8) In no event shall the commission make any charge against a taxpayer for an audit.

(9) As used in this article, "tax," in addition to the meaning ascribed to it in article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration.

(1) Whenever the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this article in effect, notwithstanding the provisions of article VII.

(2) The commission shall select and maintain an arbitration panel composed of officers and employees of state and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

(3) Whenever a taxpayer who has elected to employ article IV, or whenever the laws of the party state or subdivision thereof are substantially identical with the relevant provisions of article IV, the taxpayer, by written notice to the commission and to each party state or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the state or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by 2 or more party states or subdivisions thereof. Each party state and subdivision thereof hereby consents to

the arbitration as provided herein, and agrees to be bound thereby.

(4) The arbitration board shall be composed of 1 person selected by the taxpayer, 1 by the agency or agencies involved, and 1 member of the commission's arbitration panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the arbitration panel. The 2 persons selected for the board in the manner provided by the foregoing provisions of this paragraph shall jointly select the third member of the board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the arbitration panel. No member of a board selected by lot shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

(5) The board may sit in any state or subdivision party to the proceeding, in the state of the taxpayer's incorporation, residence or domicile, in any state where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

(6) The board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The board shall act by majority vote.

(7) The board shall have power to administer oaths, take testimony, subpoena and require the attendance

of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the board. In case of failure to obey a subpoena, and upon application by the board, any judge of a court of competent jurisdiction of the state in which the board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the order as a contempt. The provisions of this paragraph apply only in states that have adopted this article.

(8) Unless the parties otherwise agree the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the board in such manner as it may determine. The commission shall fix a schedule of compensation for members of arbitration boards and of other allowable expenses and costs. No officer or employee of a state or local government who serves as a member of a board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such board member shall be entitled to expenses.

(9) The board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

(10) The board shall file with the commission and with each tax agency represented in the proceeding: the determination of the board; the board's written statement of its reasons therefor; the record of the board's proceedings; and any other documents

required by the arbitration rules of the commission to be filed.

(11) The commission shall publish the determinations of boards together with the statements of the reasons therefor.

(12) The commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party states.

(13) Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceeding.

Article X. Entry Into Force and Withdrawal.

(1) This compact shall enter into force when enacted into law by any 7 states. Thereafter, this compact shall become effective as to any other state upon its enactment thereof. The commission shall arrange for notification of all party states whenever there is a new enactment of the compact.

(2) Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

(3) No proceeding commenced before an arbitration board prior to the withdrawal of a state and to which the withdrawing state or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdiction.

Nothing in this compact shall be construed to:

(a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement article III (2) of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: provided that the definition of "tax" in article VIII (9) may apply for the purposes of that article and the commission's powers of study and recommendation pursuant to article VI (3) may apply.

(c) Withdraw or limit the jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Serverability.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby.

If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters.

Enacting section 1. This amendatory act shall be retroactively applied to tax years beginning after December 31, 2007 and reflects the original intention of the legislature that the provisions of the Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, governing the apportionment and allocation of the tax base are the exclusive method for apportioning the tax base under that act.

APPENDIX L

MICHIGAN BUSINESS TAX ACT

Act 36 of 2007

AN ACT to meet deficiencies in state funds by providing for the imposition, levy, computation, collection, assessment, reporting, payment, and enforcement of taxes on certain commercial, business, and financial activities; to prescribe the powers and duties of public officers and state departments; to provide for the inspection of certain taxpayer records; to provide for interest and penalties; to provide exemptions, credits, and refunds; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and to make appropriations.

History: 2007, Act 36, Eff. Jan. 1, 2008;—Am. 2007, Act 145, Imd. Eff. Dec. 1, 2007.

Compiler's note: Enacting section 1 of Act 36 of 2007 provides:

"Enacting section 1. This act takes effect January 1, 2008 and applies to all business activity occurring after December 31, 2007."

Enacting section 3 of Act 145 of 2007 provides:

"Enacting section 3. Sections 281 and 451 of the Michigan business tax act, 2007 PA 36, MCL 208.1281 and 208.1451, as added by this amendatory act, and sections 105, 111, 113, 201, 239, 265, 403, 405, 409, 413, 445, 447, 515, and 601 of the Michigan business tax act, 2007 PA 36, MCL 208.1105, 208.1111, 208.1113, 208.1201, 208.1239, 208.1265, 208.1403, 208.1405, 208.1409, 208.1413, 208.1445, 208.1447, 208.1515, and 208.1601, as amended by this amendatory act, take effect January 1, 2008 and apply to all business activity occurring after December 31, 2007."

Enacting section 1 of Act 39 of 2011 provides:

"Enacting section 1. The Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, is repealed effective on the date that the secretary of state receives a written notice from the department of treasury that the last certificated credit or any carryforward from that certificated credit has been claimed."

Popular name: MBT

208.1101 Short title; legislative intent.

Sec. 101. (1) This act shall be known and may be cited as the "Michigan business tax act".

(2) It is the intent of the legislature that the tax levied under this act and the various credits available under this act will serve to improve the economic condition of this state, foster continued and diverse economic growth in this state, and enable this state to compete fairly and effectively in the world marketplace for economic development opportunities that will provide for and protect the health, safety, and welfare of the citizens of this state, now and in the future.

History: 2007, Act 36, Eff. Jan. 1, 2008.

Compiler's note: Enacting section 1 of Act 36 of 2007 provides:

"Enacting section 1. This act takes effect January 1, 2008 and applies to all business activity occurring after December 31, 2007."

Enacting section 1 of Act 39 of 2011 provides:

"Enacting section 1. The Michigan business tax act, 2007 PA 36, MCL 208.1101 to 208.1601, is repealed effective on the date that the secretary of state receives a written notice from the department of treasury that the last certificated credit or any carryforward from that certificated credit has been claimed."

Popular name: MBT

208.1301 Tax base; apportionment; allocation; taxpayer subject to tax in another state; circumstances.

Sec. 301. (1) Except as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter.

(2) Each tax base of a taxpayer whose business activities are confined solely to this state shall be allocated to this state. Each tax base of a taxpayer whose business activities are subject to tax both within and outside of this state shall be apportioned to this state by multiplying each tax base by the sales factor calculated under section 303.

(3) A taxpayer whose business activities are subject to tax both within and outside of this state is subject to tax in another state in either of the following circumstances:

(a) The taxpayer is subject to a business privilege tax, a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax or a tax of the type imposed under this act in that state.

(b) That state has jurisdiction to subject the taxpayer to 1 or more of the taxes listed in subdivision (a) regardless of whether that state does or does not subject the taxpayer to that tax.

History: 2007, Act 36, Eff. Jan. 1, 2008.

Compiler's note: Enacting section 1 of Act 36 of 2007 provides:

"Enacting section 1. This act takes effect January 1, 2008 and applies to all business activity occurring after December 31, 2007."

Popular name: MBT

208.1303 Sales factor; calculation.

Sec. 303. (1) Except as otherwise provided in subsection (2) and section 311, the sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax year and the denominator of which is the total sales of the taxpayer everywhere during the tax year.

(2) Except as otherwise provided under this subsection, for a taxpayer that is a unitary business group, sales include sales in this state of every person included in the unitary business group without regard to whether the person has nexus in this state. Sales between persons included in a unitary business group must be eliminated in calculating the sales factor.

History: 2007, Act 36, Eff. Jan. 1, 2008.

Compiler's note: Enacting section 1 of Act 36 of 2007 provides:

"Enacting section 1. This act takes effect January 1, 2008 and applies to all business activity occurring after December 31, 2007."

Popular name: MBT

APPENDIX M

[No. 343.]

AN ACT to adopt a multistate tax compact to facilitate and promote convenient, uniform, nonduplicative and proper determination of state and local tax liability of multistate taxpayers.

The People of the State of Michigan enact:

205.581 Multistate tax compact; enactment. [M.S.A. 4.146(101)]

Sec. 1. The multistate tax compact is enacted into law and entered into with all jurisdictions legally joining therein, in the form substantially as follows:

MULTISTATE TAX COMPACT

Article I. Purposes.

The purposes of this compact are to:

(1) Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

(2) Promote uniformity or compatibility in significant components of tax systems.

(3) Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

(4) Avoid duplicative taxation.

Article II. Definitions.

As used in this compact:

(1) "State" means a state of the United States, the district of Columbia, the commonwealth of Puerto

Rico, or any territory or possession of the United States.

(2) "Subdivision" means any governmental unit or special district of a state.

(3) "Taxpayer" means any corporation, partnership, firm, association, governmental unit or agency or person acting as a business entity in more than 1 state.

(4) "Income tax" means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, 1 or more forms of which expenses are not specifically and directly related to particular transactions.

(5) "Capital stock tax" means a tax measured in any way by the capital of a corporation considered in its entirety.

(6) "Gross receipts tax" means a tax, other than a sales tax, which is imposed on or measured by the gross volume of business, in terms of gross receipts or in other terms, and in the determination of which no deduction is allowed which would constitute the tax an income tax.

(7) "Sales tax" means a tax imposed with respect to the transfer for a consideration of ownership, possession or custody of tangible personal property or the rendering of services measured by the price of the tangible personal property transferred or services rendered and which is required by state or local law to be separately stated from the sales price by the seller, or which is customarily separately stated from the sales price, but does not include a tax imposed exclusively on the sale of a specifically identified commodity or article or class of commodities or articles.

(8) "Use tax" means a nonrecurring tax, other than a sales tax, which (a) is imposed on or with respect to the exercise or enjoyment of any right or power over tangible personal property incident to the ownership, possession or custody of that property or the leasing of that property from another including any consumption, keeping, retention, or other use of tangible personal property and (b) is complementary to a sales tax.

(9) "Tax" means an income tax, capital stock tax, gross receipts tax, sales tax, use tax, and any other tax which has a multistate impact, except that the provisions of articles III, IV and V of this compact shall apply only to the taxes specifically designated therein and the provisions of article IX of this compact shall apply only in respect to determinations pursuant to article IV.

Article III. Elements of Income Tax Laws.

Taxpayer Option, State and Local Taxes.

(1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in 2 or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV. This election for any tax year may be made in all party states or subdivisions thereof or in any one or more of the party states or subdivisions thereof without reference to the election made in the others. For the purposes of this paragraph, taxes imposed by subdivisions shall be considered separately from state taxes and the apportionment and allocation also may be applied to

the entire tax base. In no instance wherein article IV is employed for all subdivisions of a state may the sum of all apportionments and allocations to subdivisions within a state be greater than the apportionment and allocation that would be assignable to that state if the apportionment or allocation were being made with respect to a state income tax.

Taxpayer Option, Short Form.

(2) Each party state or any subdivision thereof which imposes an income tax shall provide by law that any taxpayer required to file a return, whose only activities within the taxing jurisdiction consist of sales and do not include owning or renting real estate or tangible personal property, and whose dollar volume of gross sales made during the tax year within the state or subdivision, is not in excess of $100,000.00 may elect to report and pay any tax due on the basis of a percentage of such volume, and shall adopt rates which shall produce a tax which reasonably approximates the tax otherwise due. The multistate tax commission, not more than once in 5 years, may adjust the $100,000.00 figure in order to reflect such changes as may occur in the real value of the dollar, and such adjusted figure, upon adoption by the commission, shall replace the $100,000.00 figure specifically provided herein. Each party state and subdivision thereof may make the same election available to taxpayers additional to those specified in this paragraph.

Coverage.

(3) Nothing in this article relates to the reporting or payment of any tax other than an income tax.

Article IV. Division of Income.

(1) As used in this article, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, credit union, cooperative bank, small loan company, sales finance company, investment company, or any type of insurance company.

(e) "Nonbusiness income" means all income other than business income.

(f) "Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipe line, or the production, transmission, sale, delivery, or furnishing of electricity, water or steam; and (2) whose rates of charges for goods or services have been established or approved by a federal, state or local government or governmental agency.

(g) "Sales" means all gross receipts of the taxpayer not allocated under paragraphs of this article.

(h) "State" means any state of the United States, the district of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(i) "This state" means the state in which the relevant tax return is filed or, in the case of application of this article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

(2) Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a financial organization or public utility or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this article. If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this article, the taxpayer may elect to allocate and apportion his entire net income as provided in this article.

(3) For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to

subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

(4) Rents and royalties from real or tangible personal property, capital gains, interest, dividends or patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs 5 through 8 of this article.

(5) (a) Net rents and royalties from real property located in this state are allocable to this state.

> (b) Net rents and royalties from tangible personal property are allocable to this state: (1) If and to the extent that the property is utilized in this state, or (2) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.
>
> (c) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(6) (a) Capital gains and losses from sales of real property located in this state are allocable to this state.

(b) Capital gains and losses from sales of tangible personal property are allocable to this state if (1) the property had a situs in this state at the time of the sale, or (2) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

(7) Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

(8) (a) Patent and copyright royalties are allocable to this state: (1) if and to the extent that the patent or copyright is utilized by the payer in this state, or (2) if and to the extent that the patent copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(b) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(9) 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.

(10) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

(11) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(12) The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(13) The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

(14) Compensation is paid in this state if:

(a) The individual's service is performed entirely within the state;

(b) The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(c) Some of the service is performed in the state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(15) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

(16) Sales of tangible personal property are in this state if:

(a) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.

(17) Sales, other than sales of tangible personal property, are in this state if:

(a) The income-producing activity is performed in this state; or

(b) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

(18) If the allocation and apportionment provisions of this article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) Separate accounting;

(b) The exclusion of any one or more of the factors;

(c) The inclusion of 1 or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Article V. Elements of Sales and Use Tax Laws.

Tax Credit.

(1) Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, and any unused portion of

the credit shall then be applied against the amount of any use tax due a subdivision.

Exemption Certificates, Vendors May Rely.

(2) Whenever a vendor receives and accepts in good faith from a purchaser a resale or other exemption certificate or other written evidence of exemption authorized by the appropriate state or subdivision taxing authority, the vendor shall be relieved of liability for a sales or use tax with respect to the transaction.

Article VI. The Commission.

Organization and Management.

(1) (a) The multistate tax commission is hereby established. It shall be composed of 1 "member" from each party state who shall be the head of the state agency charged with the administration of the types of taxes to which this compact applies. If there is more than 1 such agency, the state shall provide by law for the selection of the commission member from the heads of the relevant agencies. State law may provide that a member of the commission be represented by an alternate but only if there is on file with the commission written notification of the designation and identity of the alternate. The attorney general of each party state or his designee, or other counsel if the laws of the party state specifically provide, shall be entitled to attend the meetings of the commission, but shall not vote. Such attorneys general, designees, or other counsel shall receive all notices of meetings required under paragraph 1 (e) of this article.

(b) Each party state shall provide by law for the selection of representatives from its subdivisions affected by this compact to consult with the commission member from that state.

(c) Each member shall be entitled to 1 vote. The commission shall not act unless a majority of the members are present, and no action shall be binding unless approved by a majority of the total number of members.

(d) The commission shall adopt an official seal to be used as it may provide.

(e) The commission shall hold an annual meeting and such other regular meetings as its bylaws may provide and such special meetings as its executive committee may determine. The commission bylaws shall specify the dates of the annual and any other regular meetings, and shall provide for the giving of notice of annual, regular and special meetings. Notices of special meetings shall include the reasons therefor and an agenda of the items to be considered.

(f) The commission shall elect annually, from among its members, a chairman, a vice chairman and a treasurer. The commission shall appoint an executive director who shall serve at its pleasure, and it shall fix his duties and compensation. The executive director shall be secretary of the commission. The commission shall make provision for the bonding of such of its officers and employees as it may deem appropriate.

(g) Irrespective of the civil service, personnel or other merit system laws of any party state, the executive director shall appoint or discharge such personnel as may be necessary for the performance of the functions of the commission and shall fix their duties and compensation. The commission bylaws shall provide for personnel policies and programs.

(h) The commission may borrow, accept or contract for the services of personnel from any state, the United States, or any other governmental entity.

(i) The commission may accept for any of its purposes and functions any and all donations and grants of money, equipment, supplies, materials and services, conditional or otherwise, from any governmental entity, and may utilize and dispose of the same.

(j) The commission may establish 1 or more offices for the transacting of its business.

(k) The commission shall adopt bylaws for the conduct of its business. The commission shall publish its bylaws in convenient form, and shall file a copy of the bylaws and any amendments thereto with the appropriate agency or officer in each of the party states.

(l) The commission annually shall make to the governor and legislature of each party state a report covering its activities for the preceding year. Any donation or grant accepted by the commission or services borrowed shall be reported in the annual report of the commission, and shall include the nature, amount and conditions, if any, of the donation, gift, grant or services borrowed and the identity of the donor or lender. The commission may make additional reports as it may deem desirable.

Committees.

(2) (a) To assist in the conduct of its business when the full commission is not meeting, the commission shall have an executive committee of 7 members, including the chairman, vice chairman, treasurer and 4 other members elected annually by the commission. The executive committee, subject to the provisions of this compact and consistent with the policies of the commission, shall function as provided in the bylaws of the commission.

(b) The commission may establish advisory and technical committees, membership on which may include private persons and public officials, in furthering any of its activities. Such committees may consider any matter of concern to the commission, including problems of special interest to any party state and problems dealing with particular types of taxes.

(c) The commission may establish such additional committees as its bylaws may provide.

Powers.

(3) In addition to powers conferred elsewhere in this compact, the commission shall have power to:

(a) Study state and local tax systems and particular types of state and local taxes.

(b) Develop and recommend proposals for an increase in uniformity or compatibility of state and local tax laws with a view toward encouraging the simplification and improvement of state and local tax law and administration.

(c) Compile and publish information as in its judgment would assist the party states in implementation of the compact and taxpayers in complying with state and local tax laws.

(d) Do all things necessary and incidental to the administration of its functions pursuant to this compact.

Finance.

(4) (a) The commission shall submit to the governor or designated officer or officers of each party state a budget of its estimated expenditures for such period as may be required by the laws of that state for presentation to the legislature thereof.

(b) Each of the commission's budgets of estimated expenditures shall contain specific recommendations of the amounts to be appropriated by each of the party states. The total amount of appropriations requested under any such budget shall be apportioned among the party states as follows: one-tenth in equal shares; and the remainder in proportion to the amount of revenue collected by each party state and its subdivisions from income taxes, capital stock taxes, gross receipts taxes, sales and use taxes. In determining such amounts, the commission shall employ such available public sources of information as, in its judgment, present the most equitable and accurate comparisons among the party states. Each of the commission's budgets of estimated expenditures and requests for appropriations shall indicate the sources used in obtaining information employed in applying the formula contained in this paragraph.

(c) The commission shall not pledge the credit of any party state. The commission may meet any of its obligations in whole or in part with funds available to it under paragraph (1) (i) of this article: provided that the commission takes specific action setting aside such funds prior to incurring any obligation to be met in whole or in part in such manner. Except where the commission makes use of funds available to it under paragraph (1) (i), the commission shall not incur any obligation prior to the allotment of funds by the party states adequate to meet the same.

(d) The commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the commission shall be subject to the audit and accounting procedures established under its bylaws. All receipts and disbursements of funds handled by the commission shall be audited yearly by a certified or licensed public accountant and the report of the audit shall be included in and become part of the annual report of the commission.

(e) The accounts of the commission shall be open at any reasonable time for inspection by duly constituted officers of the party states and by any persons authorized by the commission.

(f) Nothing contained in this article shall be construed to prevent commission compliance with laws relating to audit or inspection of accounts by or on behalf of any government contributing to the support of the commission.

Article VII. Uniform Regulations and Forms.

(1) Whenever any 2 or more party states, or subdivisions of party states, have uniform or similar provisions of law relating to an income tax, capital stock tax, gross receipts tax, sales or use tax, the commission

may adopt uniform regulations for any phase of the administration of such law, including assertion of jurisdiction to tax, or prescribing uniform tax forms. The commission may also act with respect to the provisions of article IV of this compact.

(2) Prior to the adoption of any regulation, the commission shall:

(a) As provided in its bylaws, hold at least 1 public hearing on due notice to all affected party states and subdivisions thereof and to all taxpayers and other persons who have made timely request of the commission for advance notice of its regulation-making proceedings.

(b) Afford all affected party states and subdivisions and interested persons an opportunity to submit relevant written data and views, which shall be considered fully by the commission.

(3) The commission shall submit any regulations adopted by it to the appropriate officials of all party states and subdivisions to which they might apply. Each such state and subdivision shall consider any such regulation for adoption in accordance with its own laws and procedures.

Article VIII. Interstate Audits.

(1) This article shall be in force only in those party states that specifically provide therefor by statute.

(2) Any party state or subdivision thereof desiring to make or participate in an audit of any accounts, books, papers, records or other documents may request the commission to perform the audit on its behalf. In responding to the request, the commission shall have access to and may examine, at any reasonable time, such accounts, books, papers, records, and

other documents and any relevant property or stock of merchandise. The commission may enter into agreements with party states or their subdivisions for assistance in performance of the audit. The commission shall make charges, to be paid by the state or local government or governments for which it performs the service, for any audits performed by it in order to reimburse itself for the actual costs incurred in making the audit.

(3) The commission may require the attendance of any person within the state where it is conducting an audit or part thereof at a time and place fixed by it within such state for the purpose of giving testimony with respect to any account, book, paper, document. other record, property or stock of merchandise being examined in connection with the audit. If the person is not within the jurisdiction, he may be required to attend for such purpose at any time and place fixed by the commission within the state of which he is a resident: provided that such state has adopted this article.

(4) The commission may apply to any court having power to issue compulsory process for orders in aid of its powers and responsibilities pursuant to this article and any and all such courts shall have jurisdiction to issue such orders. Failure of any person to obey any such order shall be punishable as contempt of the issuing court. If the party or subject matter on account of which the commission seeks an order is within the jurisdiction of the court to which application is made, such application may be to a court in the state or subdivision on behalf of which the audit is being made or a court in the state in which the object of the order being sought is situated. The provisions of this

paragraph apply only to courts in a state that has adopted this article.

(5) The commission may decline to perform any audit requested if it finds that its available personnel or other resources are insufficient for the purpose or that, in the terms requested, the audit is impracticable of satisfactory performance. If the commission, on the basis of its experience, has reason to believe that an audit of a particular taxpayer, either at a particular time or on a particular schedule, would be of interest to a number of party states or their subdivisions, it may offer to make the audit or audits, the offer to be contingent on sufficient participation therein as determined by the commission.

(6) Information obtained by any audit pursuant to this article shall be confidential and available only for tax purposes to party states, their subdivisions or the United States. Availability of information shall be in accordance with the laws of the states or subdivisions on whose account the commission performs the audit, and only through the appropriate agencies or officers of such states or subdivisions. Nothing in this article shall be construed to require any taxpayer to keep records for any period not otherwise required by law.

(7) Other arrangements made or authorized pursuant to law for cooperative audit by or on behalf of the party states or any of their subdivisions are not superseded or invalidated by this article.

(8) In no event shall the commission make any charge against a taxpayer for an audit.

(9) As used in this article, "tax," in addition to the meaning ascribed to it in article II, means any tax or license fee imposed in whole or in part for revenue purposes.

Article IX. Arbitration.

(1) Whenever the commission finds a need for settling disputes concerning apportionments and allocations by arbitration, it may adopt a regulation placing this article in effect, notwithstanding the provisions of article VII.

(2) The commission shall select and maintain an arbitration panel composed of officers and employees of state and local governments and private persons who shall be knowledgeable and experienced in matters of tax law and administration.

(3) Whenever a taxpayer who has elected to employ article IV, or whenever the laws of the party state or subdivision thereof are substantially identical with the relevant provisions of article IV, the taxpayer, by written notice to the commission and to each party state or subdivision thereof that would be affected, may secure arbitration of an apportionment or allocation, if he is dissatisfied with the final administrative determination of the tax agency of the state or subdivision with respect thereto on the ground that it would subject him to double or multiple taxation by 2 or more party states or subdivisions thereof. Each party state and subdivision thereof hereby consents to the arbitration as provided herein, and agrees to be bound thereby.

(4) The arbitration board shall be composed of 1 person selected by the taxpayer, 1 by the agency or agencies involved, and 1 member of the commission's arbitration panel. If the agencies involved are unable to agree on the person to be selected by them, such person shall be selected by lot from the total membership of the arbitration panel. The 2 persons selected for the board in the manner provided by the foregoing

provisions of this paragraph shall jointly select the third member of the board. If they are unable to agree on the selection, the third member shall be selected by lot from among the total membership of the arbitration panel. No member of a board selected by lot shall be qualified to serve if he is an officer or employee or is otherwise affiliated with any party to the arbitration proceeding. Residence within the jurisdiction of a party to the arbitration proceeding shall not constitute affiliation within the meaning of this paragraph.

(5) The board may sit in any state or subdivision party to the proceeding, in the state of the taxpayer's incorporation, residence or domicile, in any state where the taxpayer does business, or in any place that it finds most appropriate for gaining access to evidence relevant to the matter before it.

(6) The board shall give due notice of the times and places of its hearings. The parties shall be entitled to be heard, to present evidence, and to examine and cross-examine witnesses. The board shall act by majority vote.

(7) The board shall have power to administer oaths, take testimony, subpoena and require the attendance of witnesses and the production of accounts, books, papers, records, and other documents, and issue commissions to take testimony. Subpoenas may be signed by any member of the board. In case of failure to obey a subpoena, and upon application by the board, any judge of a court of competent jurisdiction of the state in which the board is sitting or in which the person to whom the subpoena is directed may be found may make an order requiring compliance with the subpoena, and the court may punish failure to obey the

order as a contempt. The provisions of this paragraph apply only in states that have adopted this article.

(8) Unless the parties otherwise agree the expenses and other costs of the arbitration shall be assessed and allocated among the parties by the board in such manner as it may determine. The commission shall fix a schedule of compensation for members of arbitration boards and of other allowable expenses and costs. No officer or employee of a state or local government who serves as a member of a board shall be entitled to compensation therefor unless he is required on account of his service to forego the regular compensation attaching to his public employment, but any such board member shall be entitled to expenses.

(9) The board shall determine the disputed apportionment or allocation and any matters necessary thereto. The determinations of the board shall be final for purposes of making the apportionment or allocation, but for no other purpose.

(10) The board shall file with the commission and with each tax agency represented in the proceeding: the determination of the board; the board's written statement of its reasons therefor; the record of the board's proceedings; and any other documents required by the arbitration rules of the commission to be filed.

(11) The commission shall publish the determinations of boards together with the statements of the reasons therefor.

(12) The commission shall adopt and publish rules of procedure and practice and shall file a copy of such rules and of any amendment thereto with the appropriate agency or officer in each of the party states.

(13) Nothing contained herein shall prevent at any time a written compromise of any matter or matters in dispute, if otherwise lawful, by the parties to the arbitration proceeding.

Article X. Entry Into Force and Withdrawal.

(1) This compact shall enter into force when enacted into law by any 7 states. Thereafter, this compact shall become effective as to any other state upon its enactment thereof. The commission shall arrange for notification of all party states whenever there is a new enactment of the compact.

(2) Any party state may withdraw from this compact by enacting a statute repealing the same. No withdrawal shall affect any liability already incurred by or chargeable to a party state prior to the time of such withdrawal.

(3) No proceeding commenced before an arbitration board prior to the withdrawal of a state and to which the withdrawing state or any subdivision thereof is a party shall be discontinued or terminated by the withdrawal, nor shall the board thereby lose jurisdiction over any of the parties to the proceeding necessary to make a binding determination therein.

Article XI. Effect on Other Laws and Jurisdiction.

Nothing in this compact shall be construed to:

(a) Affect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement article III (2) of this compact.

(b) Apply to any tax or fixed fee imposed for the registration of a motor vehicle or any tax on motor fuel, other than a sales tax: provided that the definition of "tax" in article VIII (9) may apply for the purposes of that article and the commission's powers of study and recommendation pursuant to article VI (3) may apply.

(c) Withdraw or limit the jurisdiction of any state or local court or administrative officer or body with respect to any person, corporation or other entity or subject matter, except to the extent that such jurisdiction is expressly conferred by or pursuant to this compact upon another agency or body.

(d) Supersede or limit the jurisdiction of any court of the United States.

Article XII. Construction and Severability.

This compact shall be liberally construed so as to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this compact shall be held contrary to the constitution of any state participating therein, the compact shall remain in full force and effect as to the remaining party states and in full force and effect as to the state affected as to all severable matters.

205.582 Short form option; tax rate. [M.S.A. 4.146(102)]

Sec. 2. (1) A taxpayer electing the short form option provided for in article III (2) shall compute and pay an income tax under the provisions of section 191 of Act

No. 281 of the Public Acts of 1967, being section 206.191 of the Compiled Laws of 1948.

(2) A taxpayer subject to Act No. 284 of the Public Acts of 1964, being sections 141.501 to 141.787 of the Compiled Laws of 1948, electing the short form option shall compute and pay an income tax under the same provisions, adjusted for the difference in tax rate.

205.583 State treasurer, duties. [M.S.A. 4.146(103)]

Sec. 3. The state treasurer shall represent this state on the multistate tax commission.

205.584 Alternate state representative. [M.S.A. 4.146(104)]

Sec. 4. The member representing this state on the multistate tax commission may be represented thereon by an alternate designated by him. Any such alternate shall be a principal deputy or assistant of the department of treasury.

205.585 Attorney general, duties. [M.S.A. 4.146(105)]

Sec. 5. The attorney general of this state, or his designee, shall be entitled to attend the meetings of the multistate tax commission and otherwise participate in the activities of the multistate tax commission as permitted by article VI (1) (a) of the multistate tax compact.

205.586 Representatives of local governments; designation; consultation. [M.S.A. 4.146(106)]

Sec. 6. The governor, after consultation with representatives of local governments, shall appoint 3 persons who are representative of subdivisions affected or likely to be affected by the multistate tax compact. The member of the multistate tax commission representing this state, and any alternate designated by him, shall consult regularly with these appointees, in accordance with article VI (1) (b) of the compact.

205.587 Advisory committee; membership; meetings; duties. [M.S.A. 4.146(107)]

Sec. 7. The multistate tax compact advisory committee is established composed of the member of the multistate tax commission representing this state, any alternate designated by him, the attorney general or his designee, and 2 members of the senate, appointed by the presiding officer thereof, and 2 members of the house of representatives, appointed by the speaker thereof. The chairman shall be the member of the commission representing this state. The committee shall meet on the call of its chairman or at the request of a majority of its members, but in any event it shall meet not less than 3 times in each year. The committee may consider any and all matters relating to recommendations of the multistate tax commission and the activities of the members in representing this state thereon.

205.588 Interstate audits. [M.S.A. 4.146(108)]

Sec. 8. Article VIII of the multistate tax compact relating to interstate audits shall be in force in and with respect to this state.

205.589 Effective date. [M.S.A. 4.146(109)]

Sec. 9. This act shall become effective July 1, 1970.

Approved January 3, 1970.

APPENDIX N

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United

States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX O

U.S. Constitution, Art. I, § 10, cl. 1

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.