

## Michigan Court of Appeal finds Multistate Tax Compact applicable to the former Michigan Single Business Tax (SBT) Act

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March 2, 2016

On February 25, 2016, the Michigan Court of Appeals released a decision for publication in the consolidated case of *AK Steel Holding Corporation v. Department of Treasury*, which upholds the ability of taxpayers to make the Multistate Tax Compact election under the former Single Business Tax (SBT) Act. Miller Canfield represents the taxpayers in 21 of the 23 cases.

The Court of Appeals applied the precedent of the Michigan Supreme Court's previous 2014 decision in *IBM v. Department of Treasury* involving the Michigan Business Tax (MBT) to the SBT, which was in effect through 2007.

In *IBM* (a taxpayer also represented by Miller Canfield), Treasury had argued that the SBT was not an income tax and that the SBT had repealed the MTC election by implication when the state gradually increased the weighting of the SBT sales factor from 1994 to 2007. The Court rejected the trial judge's conclusion that the MTC election had been repealed for essentially the same reasons that the Supreme Court in *IBM* had rejected the Department's implied repeal argument under the MBT.

Treasury could appeal the decision to the Michigan Supreme Court, but in light of the parallels between these cases and *IBM* it seems unlikely that the Court would review the decision.

This decision reinforces the relevance of the MTC election for periods prior to the enactment of the MBT, and thus it may strengthen the challenges to Public Act 282 of 2014, which purports to retroactively repeal the compact back to 2008. That legislation suggests that the MTC election was incompatible with the MBT while our courts have now found that the election was perfectly harmonious with both the SBT and MBT.

Beyond these cases there may not be a significant number of other claims pending because the statute of limitation would have expired in 2012, five years after 2007, the last SBT tax year. The refund population is undoubtedly much smaller than the \$1.1B in refunds Treasury estimated that it could owe under *IBM*, but it is possible that some companies could still have the ability to file claims if they had audits for prior periods that acted to suspend the statute of limitations. Audits that remained open for more than 26 months could permit taxpayers to file claims today, at least for 2007.

Since the MTC has already been repealed back to 2008 the Compact can't be "re-repealed" back to an earlier period, at least not unless it was first re-enacted. If the legislature were to take such an unusual action, it would have relate back more than 20 years to when the SBT first deviated from the MTC apportionment formula, which could serve to undermine its earlier retroactive legislation and could provide further ammunition for challenges to that legislation.

If you have questions about this decision, please contact Gregory Nowak or any other Miller Canfield attorney.

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