

## Snyder administration seeks input on MBT treatment of foreign disregarded entities

---

September 23, 2011

The Snyder administration is currently examining the treatment of US and foreign disregarded entities under the MBT in connection with corrective legislation addressing the implication of the Michigan Court of Appeals decision in *Kmart Michigan Property Services v Treasury*, 283 Mich App 647 (2009), lv den 722 NW2d 421 (2009), and is requesting input from interested parties on the treatment of foreign disregarded entities. While the administration has resolved to enact clarifying legislation reversing the effect of the *Kmart* decision as it relates to US disregarded entities, it has not determined its position regarding the treatment of foreign disregarded entities, and is therefore seeking input regarding the preferred treatment of foreign disregarded entities under the MBT before pursuing clarifying legislation affecting foreign disregarded entities.

The Michigan Department of Treasury issued guidance in 2008 specifying that foreign disregarded entities owned by a US corporation were not to be disregarded under the MBT but were to be treated as separate persons and, as foreign entities were not includible in a unitary return. This was due to the limitation of a unitary group to only US persons. This was in contrast to the policy guidance issued by Treasury regarding US disregarded entities which specified that US disregarded entities were to be disregarded for MBT purposes in conformity with the federal treatment. It is this policy position as it relates to foreign disregarded entities which is now being reconsidered.

FAQ Mi 27 (4/15/08) provides in the last paragraph:

"CFC's as Disregarded Subsidiary of U.S. Parent. As stated above, unitary business groups cannot include foreign corporations. Therefore, a controlled foreign corporation that is a disregarded subsidiary of a U.S. [corporation] cannot be a member of a unitary business group - even one that includes its U.S. parent. In that case, the foreign entity must file a separate return."

Similarly, FAQ U36 (8/19/08) provides in the last paragraph:

"Foreign entities or foreign operating entities are also excluded if that entity is the disregarded entity of a domestic entity included in a unitary business group. In that case, the foreign entity must file a separate return."

As a result of the *Kmart* decision, the Michigan Department of Treasury issued a notice in November of 2010 mandating that taxpayers file amended returns under the MBT by June 30, 2011, to reflect US disregarded entities as separate persons. (The notice was amended in May of 2011 to extend this deadline to October 30, 2011). Such amended returns are required even if the return results in no change in tax liability. The notice did not address foreign disregarded entities given that Treasury's policy had treated them as separate persons consistent with the *Kmart* decision from the beginning of the MBT.

Legislation reversing the effect of the *Kmart* decision as it relates to the MBT for US disregarded entities is expected to be enacted by the end of September, permitting Treasury to revoke this notice. While legislation clarifying the treatment of foreign disregarded entities is also anticipated, the administration is seeking input regarding the implications of either codifying its current administrative policy reflected in FAQ Mi 27 and U36, or alternately overruling this guidance and making the treatment of foreign disregarded entities consistent with the treatment of US disregarded entities. The

Continued

---

latter result would reflect full conformity with the federal tax treatment of not distinguishing between US and foreign entities, but would retroactively modify the policy guidance which Treasury had issued in 2008.

For more information regarding this issue please contact any member of the Miller Canfield State and Local Tax group or the author:

Greg Nowak  
State and Local Tax  
313.496.7963