

Michigan Supreme Court in Malpass Allows Use of Unitary or Separate Reporting Methods to Apportion Income from Multistate Businesses

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Multistate business income may be reported by individuals through either the unitary method or the separate-entity method under the Michigan Supreme Court's decision in *Malpass et al v. Department of Treasury*, released June 24, 2013.

A unanimous court found that either method could be considered consistent with the Michigan Individual Income Tax Act. The justices gave no weight to the Department's historic practice of permitting only the separate-entity method, noting that the Department had failed to promulgate a rule requiring that method, and found that given that the statute is broad enough to permit either method, it would "conflict with the indicated spirit and purpose of the legislature" to limit taxpayers only to the separate-entity method. The Court therefore concluded:

Faced with a statutory provision that is broad enough to encompass both reporting options—but does not choose between them—the Department asks this Court to adopt its preferred methodology. However, we decline this invitation to engage in interstitial rule making because "[t]o supply omissions transcends the judicial function." Instead, in the absence of a policy choice by the Legislature, we conclude that the ITA permits either reporting method.

The Court also found that unitary reporting was proper even when the unitary business includes an entity located in a foreign country.

While both cases involved taxpayers seeking to utilize the unitary method, it is interesting to note that the Court did not find that this method is mandatory, but rather appears to conclude that taxpayers may elect to utilize the separate-entity or unitary method at their discretion. This would appear to create opportunities for taxpayers to select the most favorable method from year to year, and could give rise to opportunities for refunds.

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