

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Ronayne Krause, P.J., and Borrello and Riordan, JJ

INTERNATIONAL BUSINESS
MACHINES CORPORATION,

Supreme Court No. 146440

Plaintiff-Appellant,

Court of Appeals No. 306618

v

Court of Claims No. 11-33-MT

MICHIGAN DEPARTMENT OF
TREASURY,

Defendant-Appellee,

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**AMICUS CURIAE BRIEF OF MICHIGAN MUNICIPAL LEAGUE, MICHIGAN
TOWNSHIPS ASSOCIATION AND MICHIGAN ASSOCIATION OF COUNTIES IN
SUPPORT OF MOTION FOR REHEARING**

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STATEMENT OF QUESTION INVOLVED

- I. DESPITE THE MANDATORY SINGLE SALES FACTOR APPORTIONMENT FORMULA IMPOSED BY THE BUSINESS TAX ACT AND THE ABSENCE IN THAT ACT OF ANY PROVISION EXEMPTING TAXPAYERS FROM THAT FORMULA, MAY IBM NONETHELESS UTILIZE THE THREE-FACTOR APPORTIONMENT FORMULA OF THE EARLIER-ADOPTED MULTISTATE TAX COMPACT FOR ITS 2008 TAXES?

The Court of Claims said: NO

The Court of Appeals said: NO

This Court said: YES

Plaintiff-Appellant IBM says: YES

Amici Curiae say: NO

STATEMENT OF FACTS AND PROCEEDINGS

Amici Curiae accepts the statement of facts and proceedings contained in the lead opinion issued by this Court on July 14, 2014, adding only that in its July 14, 2014 decision this Court reversed the decisions of the Court of Claims and the Court of Appeals.

ARGUMENT

I. INTRODUCTION

A. Interest of Amici Curiae

Amicus Curiae Michigan Municipal League (“Michigan Municipal League”) is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 524 Michigan local governments, of which 478 are also members of the Michigan Municipal League Legal Defense Fund (“Legal Defense Fund”). The Michigan Municipal League operates the Legal Defense Fund through a board of directors. The purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. This brief amicus curiae is authorized by the Legal Defense Fund’s Board of Directors, whose membership includes the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Lori Grigg Bluhm, city attorney, Troy; Clyde J. Robinson, city attorney, Kalamazoo; Randall L. Brown, city attorney, Portage; Catherine M. Mish, city attorney, Grand Rapids; Eric D. Williams, city attorney, Big Rapids; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, Boyne City and Petoskey; Robert J. Jamo, city attorney, Menominee; John C. Schrier, city attorney, Muskegon; Thomas R. Schultz, city attorney, Farmington and Novi; and William C. Mathewson, general counsel, Michigan Municipal League.

Amicus Curiae Michigan Townships Association is a Michigan non-profit corporation whose membership includes in excess of 1,230 townships within the State of Michigan (including both general law and charter townships) joined together for the purpose of providing education, exchange of information and guidance to and among township officials to enhance the

more efficient and knowledgeable administration of township government services under the Constitution and laws of the State of Michigan. The Board of Directors of the Michigan Townships Association has authorized and directed this office as attorneys for such Association to file this Amicus Curiae brief.

Amicus Curiae Michigan Association of Counties (MAC) is a non-partisan, non-profit organization which advances education, communication and cooperation among county government officials in the state of Michigan. MAC is the counties' voice at the State Capitol, providing legislative support on key issues affecting counties and their affiliate entities. Its membership is comprised of Michigan counties, with an elected Board of Directors representing all regions of the state. MAC's Board of Directors is authorized to represent the member counties in litigation of statewide significance.

This brief amicus curiae is authorized by the MAC Board of Directors, which includes the MAC executive director and the president, officers and directors: Shelly Pinkelman, President and Crawford County Commissioner; Jon Campbell, First Vice President and Allegan County Commissioner; Jerry Doucette, Second Vice President and Alger County Commissioner; Toni Mocerri, Macomb County Commissioner; Joseph Palamara, Wayne County Commissioner; Kenneth Borton, Otsego County Commissioner; Don Disselkoen, Ottawa County Commissioner; Michael Hanley, Saginaw County Commissioner; Dan LaFoilie, Schoolcraft County Commissioner; Michael Crawford, Antrim County Commissioner; Pat Gardner, Newago County Commissioner; Max Thiele, Allegan County Commissioner; Shelley Goodman Taub, Oakland County Commissioner; Matthew Bierlein, Tuscola County Commissioner; Robert Showers, Clinton County Commissioner; and Michael Spisz, Oakland County Commissioner.

Because the governmental units represented by these organizations rely on revenue sharing and other funds made available by the State to provide vital public services to their citizens, the ability of these governmental units to provide such services will be significantly impaired if state revenues are reduced by an amount in excess of one billion dollars, as is estimated to be the likely result of this Court's July 14, 2014 decision. Even without this unanticipated shortfall, a 2013 calculation by Plante & Moran, PLLC indicated lost revenue sharing to local units over a thirteen year period had amounted to over \$6 billion. Michigan Municipal League research indicates the reduction, from what the established formula called for, of approximately \$650 million annually, has occurred despite an increase in state sales revenue which is the source of statutory revenue sharing. For example, full funding of statutory revenue sharing during 2003-14 would have meant an additional \$72 million for Grand Rapids, \$8 million for Allen Park, \$6 million for Marquette, \$4 million for Traverse City, \$4 million for Alpena, \$45 million for Warren, and no less than \$732 million for Detroit. With the state's history of underfunding revenue sharing and given the state's current budget, which certainly has not anticipated a \$1.1 billion shortfall, it is clearly implausible to expect that revenue sharing and other shared funds to local units would not be further cut under the Court's decision. Hence, amici curiae wish to submit this brief in support of the motion for rehearing filed by the Attorney General.

Because the Michigan Municipal League, Michigan Townships Association, and Michigan Association of Counties are associations representing various political subdivisions of the State and this brief is filed on their behalf, amici curiae request that this Court accept this amicus curiae brief without a motion for leave. MCR 7.306(D)(2).

B. Summary of position of Amici Curiae.

This being a matter of statutory interpretation, the Courts cardinal role is to ascertain and give effect to the intent of the Legislature, see, e.g., Burton v Reed City Hosp., 471 Mich 745, 691 NW2d 424 (2005), and in doing so it is axiomatic that where the language of the statute is clear, no other than a literal construction should be given to it. See e.g. Mac Queen v City Commission of City of Port Huron, 194 Mich 328, 160 NW 627 (1916). Each of the opinions in this case focuses primarily on yet another principle of statutory interpretation – that repeal by implication is disfavored, and that to the extent possible seemingly-conflicting statutes should be harmonized. In the view of amici curiae, the dissent correctly concluded that the apportionment option of the MTC could not be reconciled with the requirement of the BTA that the apportionment formula of the BTA be applied “except as otherwise provided in this act.” MCL 208.1301 (emphasis added), and that the MTC option, not being part of the BTA, was therefore not available to IBM. The lead opinion, on the other hand, “harmonized” the two statutes by implicitly adding the phrase “or the MCT” after the phrase “in this act” in the BTA. In so doing, the lead opinion violated the cardinal rule that legislative intent should be ascertained by relying on the words actually used by the Legislature. The concurrence, while finding the question of whether the Legislature implicitly repealed the MTC option by enacting the BTA is “close,” attempts to resolve the matter by suggesting that a 2011 amendment to the MTC requiring use of the BTA formula after 2011 meant the MTC option was available until 2011. Ironically, this suggestion amounts to an implicit repeal of the mandatory use of the BTA formula for the years 2008-2011, the very sort of implicit repeal which the majority purports to disfavor. The Court should reconsider this matter, and join the dissent in concluding that the MTC option is not

available to IBM, thereby upholding legislative intent through appropriate reliance on the clear language of the BTA.

II. THE LEAD AND CONCURRING OPINIONS, IN ATTEMPTING TO HARMONIZE THE MTC AND THE BTA, UNDERMINE THE INTENT OF THE LEGISLATURE AS EXPRESSED IN THE BTA.

A. The BTA language adopted by the Legislature.

Without repeating the history of Michigan's business tax regulation, as set forth at some length in the Court's opinions, it should be noted that at the time the MTC was adopted in 1970, the corporate income tax contained in the Income Tax of 1967 then in effect apportioned the tax base of interstate businesses by the same three-part formula as that contained in the MTC. When, after the demise of the Single Business Tax which had replaced the corporate income tax, the Legislature adopted the BTA in 2008, it specifically provided that "[e]xcept as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with [the single factor formula of] this chapter." MCL 208.1301. The lead opinion suggests that in adopting the MTC in 1970 with its formula option, the Legislature must have contemplated the possibility that the State might ultimately adopt a formula different from that in the 1967 tax act, as it in fact did in the MBT. The lead opinion, however, fails to give equal attention to the likelihood that if the Legislature subsequently adopted a different formula, knowing of the existence of the MTC, it might take steps to assure that this later-adopted formula would be applied in taxing companies doing business in Michigan. This appears to be precisely what the Legislature did when adopting the MBT by mandating that the BTA formula would apply except as otherwise provided in this act (i.e. the BTA) – it did not say "in this act or in the MTC" or "in this act or as otherwise provided by law," which are things it could well have said if it had not

meant to provide explicitly that the BTA formula would apply unless the BTA itself otherwise provided. If this helps to provide adequate state revenue, this is an unsurprising state objective.

B. Reconciliation of the BTA with the option contained in the MTC.

The dissent is correct in concluding that it is not possible both to maintain the mandatory formula of the BTA in the absence of any exception within the BTA itself and also permit unfettered exercise of the option contained in the MTC. If this results in implicit repeal of at least a portion of the MTC, that is a result which – though perhaps disfavored in a general sense – must be tolerated in carrying out legislative intent and abiding by clear statutory language.

It might also be noted, however, that it is possible to view this conclusion as something other than an implicit repeal and, moreover, possible to view the two statutes as capable of being harmonized, albeit in a more modest way than some might wish. Even if the BTA is (correctly) interpreted as not allowing a taxpayer an unfettered option to choose an allocation formula under the MTC, many provisions of the MTC remain unaffected (e.g., provisions relating to sales and use taxes, provisions relating to interstate audits, provisions establishing the Multistate Tax Commission) and, moreover, the provision relating to the allocation formula option would remain available if and when the State alters its taxation scheme in the future, as it has frequently done in the past. One may term the temporary inability to take advantage of the MTC option because of the language in the subsequently-enacted BTA as an exception or qualification rather than as a repeal. See Metro Life Ins Co v Stoll, 276 Mich 637, 268 NW 763 (1936). Further, as noted in the concurring opinion of Judge Riordan in the Court of Appeals decision in this matter (though this suggestion is dismissed in fn. 55 of this Court’s lead opinion), the MTC and the BTA can be viewed as being harmonized as a result of the continuing ability of a taxpayer under

the BTA (MCL 208.1309(1)) to seek administrative approval of use of an alternative formula, including, presumably, the MTC formula. While this would admittedly not be the unfettered option provided by the MTC, it is surely a less dramatic form of harmonization than that required by the lead opinion – namely obliterating the clear language of the BTA so that an unfettered MTC option may be exercised. As Justice McCormack observes in the dissent, other state parties to the MTC have felt free to alter such matters as the details of the MTC formula, and requiring administrative approval may well be a legitimate alteration.

C. The “window” created by the concurring opinion.

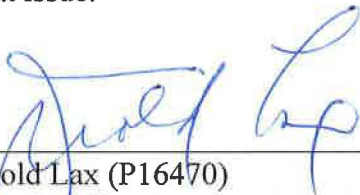
The concurrence seeks to sidestep the need to deal with issues arising from arguable repeal by implication of sections of the MTC by concluding that a recent amendment to the MTC explicitly created a window between 2008-2011 where the MTC option could continue to be exercised. Creation of this window, however, would result in repeal by implication of the BTA at least insofar as the 2008-2011 period is concerned, a result which should be no less objectionable to the majority than repeal of sections of the MTC by the BTA. The majority opinion of the Court of Appeals deals more realistically with the import, or lack thereof, of the 2011 amendment to the MTC:

We note as an aside that MCL 205.581 was amended by 2011 PA 40 to explicitly provide that the election is unavailable to Business Tax Act liability after January 1, 2011. IBM asserts that this must mean that the election *was* available prior to that date. We disagree that the amendment *must* mean anything in particular. A statute may be amended only to clarify its meaning, and the Legislature may do so while making the amendment prospective; “[i]ndeed, when no appellate court has rendered a decision contrary to the amended language, this would seem to be an obvious legislative procedure.” *Kelly Services, Inc. v Treasury Dep’t*, 296 Mich App 306, 317; 818 NW2d 482 (2012). We decline to speculate as to what the Legislature intended, and instead we analyze the statutes themselves. We deem the amendment to MCL 205.518 [sic] to be of no significance to this context.

RELIEF SOUGHT

Amici Curiae request that the Court reconsider its decision and conclude that the MTC formula cannot be used for the tax year at issue.

Dated: September 3, 2014



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