STATE OF MICHIGAN

COURT OF APPEALS

VECTREN INFRASTRUCTURE SERVICES CORP., successor-in-interest to MINNESOTA LIMITED, INC.,	FOR PUBLICATION September 30, 2021 9:10 a.m.
Plaintiff-Appellant,	
v	No. 345462 Court of Claims
DEPARTMENT OF TREASURY,	LC No. 17-000107-MT
Defendant-Appellee.	

ON REMAND

Before: TUKEL, P.J., and SAWYER and RIORDAN, JJ.

PER CURIAM.

This matter is again before us following a remand by the Supreme Court. The facts of this case are set out in our original opinion and need not be repeated here. *Vectren Infrastructure Services Corp v Dep't of Treasury*, 331 Mich App 568; 953 NW2d 213 (2020). Following the Supreme Court's remand, we determined that, in order to fully comply with the Supreme Court's directions on remand, we must ourselves first remand the matter to the trial court. We did so, and the trial court fully addressed the issue on remand.

In our original opinion, we concluded that:

> Application of the statutory formula in this case runs afoul of the Due Process and Commerce Clauses, incorporated in the statute, because it does not fairly determine the portion of income from the Sale that is reasonably attributed to in-state activities. Fairness, in part, requires that the choice of "factors used in the apportionment formula must actually reflect a reasonable sense of how [the business activity] is generated." *Container Corp of America* [463 US 159, 169; 103 S Ct 2933; 77 L Ed 2d 545 (1983)]. Looking only at the Short Year does not actually and reasonably reflect how the income from the Sale was generated. As in *Hans Rees' Sons*[, *Inc v North Carolina*, 283 US 123, 134; 51 S Ct 385; 75 L Ed

> 879 (1931), the statutory formula when applied in this case operates "so as to reach profits which are in no just sense attributable to transactions within its jurisdiction." [*Vectren*, 331 Mich App at 578.]

Defendant filed an application for leave to appeal to the Supreme Court, which in lieu of granting leave, vacated our judgment and remanded the matter to this Court "to address the plaintiff's arguments regarding the proper method for calculating the business tax due under the statutory formula." *Vectren Infrastructure Services Corp v Dep't of Treasury*, 506 Mich 964; 950 NW2d 746 (2020). The Court concluded that this "foundation issue must be addressed before determining that MCL 208.1309 requires application of an alternative method of apportionment." *Id.*

Our directions to the trial court in our remand order was to address Count I of plaintiff's first amended complaint. In a nutshell, the trial court's task on remand was to answer the question posed by the Supreme Court's remand order, namely what is the proper method under the statutory formula to calculate the tax due. More specifically, the key question addressed by the trial court on remand is whether the sale of the business should have been included in the sales factor of the statutory formula. Under MCL 208.1303(1), the sales factor is "a fraction, 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."

In a detailed analysis, the trial court determined that the definition of "sale" under MCL 208.1115(1)(a) would not include the sale of the business, Minnesota Limited, Inc. (MLI).[1] The trial court particularly drew attention to the use of the word "inventory" in the statute. After an extensive analysis, the trial court concluded that the sale of an entire business would not be equivalent to the sale of inventory. In particular, the trial court noted that the sale of the assets of MLI included equipment for which there was a depreciation allowance under the internal revenue code, which MCL 208.1111(4)(e)(ii) excludes from the definition of "inventory."[2] Thus, the trial court rejected plaintiff's argument that the sale of MLI constituted "a sale of stock in trade or inventory" and concluded that it could not be included in the sales factor denominator.

The trial court then addressed plaintiff's argument that the sale must be included in the sales factor denominator because it is included in the calculation of plaintiff's business activity. While this would seem to be a very logical and compelling argument, it fails, as the trial court

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[1] MCL 208.1115(1)(a) provides in pertinent part:

> The transfer of title to, or possession of, property that is stock in trade or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the tax period or property held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business. For intangible property, the amounts received shall be limited to any gain received from the disposition of that property.

[2] Indeed, the trial court noted "the overwhelming majority of the assets sold were depreciable assets."

pointed out, because of the differing definitions employed in the statute.[3] Simply put, the definition of "business activity" under MCL 208.1105 is broader than the definition of the sales factor denominator. Indeed, we made brief reference to this in our original opinion, and that is what lead us to conclude that applying the statutory formula to this case resulted in a constitutional violation:

> We do note, however, that we do not necessarily disagree with the Department's basic position on how to calculate the tax under the statutory formula. Its position is reasonable in light of the differing definitions of "business activity," "business income," and "sales" and how those terms are employed in calculating the tax base and applying the sales factor to apportion the sales to Michigan. But, for the reasons discussed below, we conclude that to apply the statutory formula, as the Department did, to the circumstances of this case would result in the imposition of a tax in violation of the Commerce Clause. Accordingly, allowing for an alternate formula, as plaintiff requested, is necessary to avoid the constitutional violation. [331 Mich App at 576.]

With the trial court now having fully addressed this fundamental issue, we conclude the trial court correctly determined that the proper interpretation of the relevant statutes supports defendant's application of the statutory formula and, like the trial court, we reject plaintiff's challenges to it. Having resolved the question posed to us by the Supreme Court, that brings us back to our conclusion in our original opinion. Our original opinion was essentially based upon assuming that plaintiff's challenges to the determination of the proper calculation of the tax under the statutory formula were without merit. We have now rejected plaintiff's challenges to the proper method of calculating the tax under the statutory formula.

This reaffirms the conclusion that we reached in our original opinion: that the application of the statutory formula to this case constitutes a constitutional violation. We adopt the analysis in our original opinion regarding the constitutional defect present in the case in applying the statutory formula under the facts of this case to calculate the tax owed. An alternate method of apportionment must be adopted. We again vacate the tax assessment and penalty in this case. We remand the case to the trial court with directions to determine an appropriate alternate apportionment method if the parties are unable to agree upon one.

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[3] The trial court did not delve deeply into this issue, quite properly, because it was outside the scope of the remand. In any event, the definition of "business activity" under MCL 208.1105(1), which includes "a transfer of legal or equitable title to or rental of property, whether real, personal, or mixed, tangible or intangible . . ." is sufficiently broad so as to include the sale of the business and, therefore, the sale of MLI would be included in plaintiff's business activity and business income for the determination of the tax. As for plaintiff's additional argument that including the sale of the business in the tax base, but not in the sales factor, is impermissibly inconsistent, that is a large contributing factor, at least in the context of this case, to our conclusion that this represents a constitutional violation.

Reversed and remanded for further proceedings consistent with this opinion and our original opinion. We do not retain jurisdiction. No costs.

/s/ David H. Sawyer
/s/ Michael J. Riordan

TUKEL, J., did not participate.