

STATE OF MICHIGAN
COURT OF APPEALS

INTERNATIONAL BUSINESS MACHINES
CORP,

UNPUBLISHED
November 20, 2012

Plaintiff-Appellant,

v

No. 306618
Court of Claims
LC No. 11-000033-MT

DEPARTMENT OF TREASURY,

Defendant-Appellee,

and

DEPARTMENT OF TREASURY/REVENUE
DIVISION,

Defendant,

and

MICHIGAN MANUFACTURES ASSOCIATION
and MULTISTATE TAX COMMISSION,

Amicus Curiae.

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Plaintiff, International Business Machines Corp. (IBM), appeals as of right the trial court's order granting summary disposition to defendant, Department of Treasury (the Department). We affirm.

I. FACTUAL BACKGROUND

The facts of this case are undisputed. IBM filed its Michigan Business Tax return for the tax-year 2008 and calculated its Business Income Tax (BIT) and Modified Gross Receipts Tax (MGRT) liabilities, both part of the Michigan Business Tax Act, MCL 208.1101 *et seq.*, based on a three-factor approach taking into consideration property, payroll, and sales. This calculation was derived from an apportionment formula in the Multistate Tax Compact (the Compact), MCL

205.581 *et seq.* According to IBM's calculations, it was entitled to a tax refund of \$5,955,218. However, the Department based its tax liability calculations on the apportionment formula set forth in the Business Tax Act and concluded that IBM was only entitled to a refund of \$1,253,609.

IBM filed a complaint in the Court of Claims, arguing that the Department's approach was flawed and that tax liability may be calculated pursuant to the Compact. IBM filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that both the BIT and the MGRT are income taxes and therefore the terms of the Compact entitle IBM to elect to use the Compact's three-factor approach. The Department argued that IBM was required to use the formula set forth in the Business Tax Act or to petition for approval for an alternate formula pursuant to MCL 208.1309. The Department argued that it was entitled to summary disposition pursuant to MCR 2.116(I)(2).

The Court of Claims agreed with the Department. The court entered an order granting the Department's motion for summary disposition and denying IBM's motion for summary disposition. IBM now appeals.

II. STANDARD OF REVIEW

"Questions of statutory interpretation are . . . reviewed de novo." *Grimes v Mich Dept of Transp*, 475 Mich 72, 76; 715 NW2d 275 (2006). Likewise, "[t]his Court's review of a trial court's decision to deny or grant summary disposition is de novo." *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 590; 794 NW2d 76 (2010) (internal quotations and citation omitted). "The trial court appropriately grants summary disposition to the opposing party under MCR 2.116(I)(2) when it appears to the court that the opposing party, rather than the moving party, is entitled to judgment as a matter of law." *Id.* (internal quotations and citation omitted).

III. TAX LIABILITY

This case involves questions of statutory interpretation. The "primary goal" of statutory interpretation "is to discern the intent of the Legislature by first examining the plain language of the statute." *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). When the language is clear and unambiguous, "no further judicial construction is required or permitted, and the statute must be enforced as written." *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (internal citations and quotations omitted). A statutory provision must be read in the context of the entire act, and "every word or phrase of a statute should be accorded its plain and ordinary meaning." *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011).

Neither party disputes that the Business Tax Act sets forth an apportionment method for taxpayers to calculate tax liability, the details of which are not pertinent to the instant appeal. Rather, the parties disagree about the permissive or mandatory nature of the calculation. IBM argues that the calculation formula in the Business Tax Act is optional and that IBM was permitted to calculate its 2008 tax liability pursuant to a different statute, namely, the Compact.

Pursuant to MCL 205.581(1)(Art III)(1), taxpayers “may elect to apportion and allocate” their tax liability in accordance with a three-factor formula specified in the Compact. However, pursuant to MCL 208.1301(1) and (2), “[e]xcept as otherwise provided in this act, each tax base established under this act shall be apportioned in accordance with this chapter” and the “tax base of a taxpayer . . . shall be apportioned” in accordance with a single-factor formula specified in the Business Tax Act. Consequently, there is a facial conflict between the two provisions: the Business Tax Act mandates that taxpayers’ tax liability be apportioned in one way, but the Compact mandates that taxpayers have the option of electing a different apportionment.

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 to be of no significance in this context.

We also note that the Business Tax Act contains a provision under which taxpayers may seek an alternative apportionment methodology. Pursuant to MCL 208.1309(1), “[i]f the apportionment provisions of this act do not fairly represent the extent of the taxpayer’s business activity in this state, the taxpayer may petition for or the treasurer may require” any of a variety of other apportionment methods, although the Compact formula is not referenced. Both parties agreed that MCL 208.1309(1) is completely distinct, and serves a different purpose, from the Compact election. MCL 208.1309(1) allows a taxpayer to *seek permission*, which may or may not be granted, to use a different apportionment method—and not necessarily one bearing any similarity to the method set forth in the Compact—to avoid some manner of unfairness. At oral argument, this was described as a “constitutional circuit breaker” to be employed in unusual situations only where the Business Tax Act’s default formula would have a “distortive result.”

In contrast, the Compact permits an *election of right* based on pure whim, which presumably will be exercised whenever the Compact’s apportionment happens to provide a lesser tax liability. The two serve completely different purposes. Consequently, MCL 208.1309(1) neither conflicts with nor is rendered meaningless by MCL 205.518. The existence of an election of right under the Compact would not preclude a taxpayer from seeking permission pursuant to MCL 208.1309(1) to use a unique apportionment formula on the basis of fairness; and likewise, no taxpayer would ever need to seek permission under MCL 208.1309(1) to utilize the Compact’s apportionment formula, assuming it to be available. Whether or not IBM attempted to petition the Department under MCL 208.1309(1) is irrelevant.

Repeals by implication are disfavored and will not be found unless there is a clear legislative intent to repeal and there is no other reasonable construction of the statutes at issue. *People v Koon*, 296 Mich App 223, 228; 818 NW2d 473 (2012). Nevertheless, we reluctantly conclude that there is no way to harmonize MCL 205.581 and MCL 208.1301. A statute enacted later in time will generally not impliedly repeal a more-specific earlier statute, *Wozniak v*

General Motors Corp, 198 Mich App 172, 181-182; 497 NW2d 562 (1993), and the first duty of the courts is to find any possible way of avoiding finding an irreconcilable conflict. *Nowell v Titan Ins Co*, 466 Mich 478, 482; 648 NW2d 157 (2002). However, if two statutes are genuinely in irreconcilable conflict, the later-enacted statute controls. *People v Flynn*, 330 Mich 130, 141; 47 NW2d 47 (1951). We note that the Business Tax Act is not only the newer in time, but also seemingly the more specific statute.

IBM's argument, in a nutshell, is that the election available under the Compact was dormant until such time as Michigan enacted an income tax law providing a different apportionment method, at which time the election sprung into life to permit taxpayers to choose one or the other. We do not perceive any possible way to harmonize the *mandatory* language in MCL 208.1301 with IBM's theory. If, hypothetically, MCL 208.1301 had introduced its mandate by stating "except as otherwise provided" or "except as otherwise provided by law," rather than "except as provided *in this act*" (emphasis added), then it would be obvious that the Business Tax Act and the Compact were reconcilable, because the Compact would clearly be an "otherwise provision." But as it is, the plain language of MCL 208.1301 absolutely precludes any other apportionment except by petition pursuant to MCL 208.1309. The possibility of electing a different apportionment formula as a matter of right is simply not permitted.

IBM has provided us with authority suggesting that the Compact is a binding contract. If it were to be so construed, then the Compact's election would survive the enactment of the Business Tax Act and essentially function as an exception to the Business Tax Act's dictates, much as IBM argues. Our Supreme Court has explained that a statute will not be deemed a contract in the absence of exceedingly clearly-expressed intent by the Legislature. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295, 319-325; 806 NW2d 683 (2011). Our Supreme Court has indicated that this would essentially require the Legislature to specifically use the words "contract" or "covenant" or to otherwise explicitly "surrender its power to make such changes." *Id.* Pursuant to Const 1963, Art 9, § 2, "[t]he power of taxation shall never be surrendered, suspended or contracted away."

Nowhere in MCL 205.581 is it specified that the Compact is a binding contract. Notably, pursuant to MCL 205.581(1)(Art XI)(a), the Compact shall not be construed to "[a]ffect the power of any state or subdivision thereof to fix rates of taxation, except that a party state shall be obligated to implement article III(2) of this compact." This provision does at least superficially appear to bind future Legislatures. However, Article III(2) is not the election provision at issue in the case at bar. Otherwise, the Compact provides that any portion found in conflict with a state's constitution is severable, Article XII, and that party states may withdraw at any time by enacting a repealing statute. Article X(2). Although the Compact does provide for a *proper way* to repeal the Compact, it does not appear to constitute a truly binding contract. Enacting a conflicting statute might arguably be an improper way to repeal the Compact, but not an impermissible one.

In principle, if the Business Tax Act did not impose an "income tax," then there would be no conflict. Under the Compact, "[i]ncome tax' means a tax imposed on or measured by net income including any tax imposed on or measured by an amount arrived at by deducting expenses from gross income, 1 or more forms of which expenses are not specifically and directly related to particular transactions." The Business Tax Act provides several bases for tax liability,

including a “business income tax,” MCL 208.1201, and a “modified gross receipts tax,” MCL 208.1203. It also, according to the Department, includes two other tax liabilities not at issue here. The Treasury argues that the “modified gross receipts tax” is not an “income tax,” but even if this Court accepts that argument, which we do not now decide, the Department concedes that the “business income tax” *is* an “income tax.” Consequently, at least one of the tax liabilities at issue here would, but for MCL 208.1301, be amenable to the Compact’s election. Consequently, simply construing the Business Tax Act as “not an income tax” is not an option.

IV. CONCLUSION

We are compelled to conclude that the Business Tax Act repealed by implication the election provision found in the Compact. The Court of Claims properly granted summary disposition to the Department. IBM was required to compute its tax liability pursuant to the Business Tax Act and did not petition for an alternate method of calculation under MCL 208.1309. We affirm.

/s/ Amy Ronayne Krause

/s/ Stephen L. Borrello