STATE OF MICHIGAN
IN THE COURT OF APPEALS

INTERNATIONAL BUSINESS MACHINES CORP,

Plaintiffs-Appellant,

v

MICHIGAN DEPARTMENTOF TREASURY,

Defendants-Appellee.
/

Court of Appeals No. 306618

Court of Claims No. 11-33-MT

BRIEF AMICUS CURIAE OF MULTISTATE TAX COMMISSION IN SUPPORT OF MICHIGAN DEPARTMENT OF TREASURY

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Interest of the Amicus

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of the Michigan Department of Treasury. The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967 when the required minimum of seven states had enacted it. The U.S. Supreme Court upheld the validity of the Compact in *United States Steel Corp.* v. *Multistate Tax Comm'n* 434 U.S. 452 (1978), and today forty-seven states and the District of Columbia participate in the Commission. Twenty of those jurisdictions have adopted the Compact by statute. Six are sovereignty members. Another twenty-two states are associate members.[1]

The purposes of the Compact are to: (1) facilitate proper determination of state and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of state tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of state tax administration, and (4) avoid duplicative taxation. *Multistate Tax Compact*, Art. I.

These purposes are central to the very existence of the Compact, which was the states' answer to an urgent need for reform in state taxation of interstate commerce. *See, H.R. Rep.* No.

[1] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty Members*: Georgia, Kentucky, Louisiana, New Jersey, South Carolina and West Virginia. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Wisconsin, and Wyoming.

89-952, Pt. VI, at 1143 (1965) *and Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills before Special Subcommittee on State Taxation of Interstate Commerce of the House Commission on the Judiciary*, 89th Cong., 2d Sess. (1966) (illustrating the depth and scope of Congressional inquiry into the potential for federal preemption of state tax). If the states failed to act, Congress stood ready to impose reform itself through federal legislation that would preempt and regulate important aspects of state taxation. Preserving state tax sovereignty under our vibrant federalism remains a key purpose of the Compact and the Commission.

The Commission's interest in this case arises from the Compact's purposes of promoting uniformity and preserving member states' sovereign authority to effectuate their own tax policies. Our interest is particularly acute because the Taxpayer has asserted that our member states' ability to achieve these purposes is limited, perversely, on the basis of the Compact itself. We write to correct that assertion.

As the administrative agency for the Compact, the Commission is uniquely situated to inform the Court regarding a proper interpretation of this Compact and the course of performance of its members. We interpret the terms of the Compact to allow its members the flexibility to vary from its provisions. That interpretation is supported by the course of performance of the other Compact members, consistent with the purposes of the Compact, the holdings of the United States Supreme Court, and the Compact jurisprudence from other federal and state courts. To hold otherwise would have the ironic effect of frustrating the very purposes that the Compact is intended to promote.

Argument

THE MODEL MULTISTATE TAX COMPACT AFFORDS ITS MEMBER STATES THE FLEXIBILITY TO VARY FROM ITS PROVISIONS

IBM, in its initial brief, asserts that "[t]he only way a State can undo its contractual obligations under the Compact is to withdraw from the Compact entirely. Having entered into the Compact, a legally binding contract, Michigan cannot unilaterally change its terms, short of completely withdrawing from the Compact." *Brief of Plaintiff-Appellant, International Business Machines Corp.,* at 28.

In its Reply Brief, IBM appears to have abandoned this argument, asserting that "it is completely unnecessary for the Court of Appeals to reach the question of whether the state could override its obligations under the Compact legislatively for the reason that there is simply no support for the assertion that the state attempted to override the Compact." *Reply Brief of Plaintiff-Appellant, International Business Machines Corp.,* p. 6 (emphasis in original). The Commission takes no position on whether Michigan has amended its original enactment of the Compact. Rather, the Commission writes briefly to address IBM's erroneous assertion in its initial brief that the only way a state can enact a law that varies from a provision of the Compact is to entirely withdraw from the Compact, should the Court feel it necessary to address that issue. The Multistate Tax Compact is a model law The United States Supreme Court has made clear that the enactment of the Compact did not result in "any delegation of sovereignty to the Commission," *U.S. Steel,* 434 U.S. 452, 473. As each member retains its full sovereign authority to administer its tax laws, the Compact created no obligation for its members to withdraw from the Compact in order to amend or repeal individual compact provisions.

Attached as Appendix B to IBM's initial Brief is a copy of the Commission's amicus brief in *Gillette Co. & Subsidiaries v. California Franchise Tax Board,* Case No. A130803, pending in the Court of Appeals for the State of California. In *Gillette,* the Commission explains why we interpret the terms of the Compact to allow for this flexibility; we show that our

interpretation is supported by the purposes of the Compact, the holdings of the United States Supreme Court, and Compact jurisprudence from other federal and state courts; and we explain that to hold otherwise would have the contrary effect of frustrating the very purposes that the Compact is intended to promote. In addition, Michigan Manufacturers Association succinctly summarizes the Commission's argument in *Gillette* in its amicus curiae brief in this Court, starting at page 11.

The Commission, therefore, will not belabor its argument in *Gillette.* It suffices to state that it is the position of the Commission, supported by the compact members course of performance, that should a member decide to amend its laws, including Article IV factor weighting codified at MCL 205.518 and the Article III.1 apportionment election codified at MCL 205.581, the Compact affords that member the flexibility to do so. Furthermore, it is not necessary for a member to withdraw entirely from the Compact in order to give effect to such an amendment. Michigan's adoption of a mandatory single sales factor apportionment formula to apportion both the business income tax component and the modified gross receipts tax component of the Michigan Business Tax would be wholly consistent with the terms of the Multistate Tax Compact.

The State of Michigan remains a member in good standing of the Commission, subsequent to the adoption of the Michigan Business Tax in 2008. Indicative of Michigan's continued standing in the Commission, Michigan fully participated in the Commission's annual meeting in July 2011 and its votes on Commission business were accorded full effect, precisely as the votes of any other member of the Compact in good standing. In addition, Andy Dillon, the State Treasurer of Michigan and the state's representative to the Commission, was elected by

Commission members in July 2011 to serve as a member of the Commission's Executive Committee.

Conclusion

Michigan's adoption of a mandatory single factor apportionment formula for the MBT in 2008 would be fully consistent with the flexibility afforded by the Multistate Tax Compact in allowing its member states to exercise their sovereign authority to design and implement their individual state tax systems while working together to further the purposes of the Compact.

Respectfully submitted,

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