STATE OF MICHIGAN

COURT OF CLAIMS

EMCO ENTERPRISES, INC., Plaintiff,	**OPINION AND ORDER**
v	Case No. 12-000152-MT
DEPARTMENT OF TREASURY, Defendant.	Hon. Michael J. Talbot

This matter comes before the Court pursuant to its sua sponte order to brief the Court on the application of *Int'l Business Machines Corp v Dep't of Treasury*, 496 Mich 642; 852 NW2d 865 (2014) ("*IBM*"), as well as its sua sponte order to brief the Court on why the Compact provisions should apply to a value-added tax. *Trinova Corp v Michigan Dep't of Treasury*, 498 US 358; 111 S Ct 818; 112 L Ed 2d 884 (1991). The Court concludes that pursuant to MCR 2.116(I)(2), defendant is entitled to judgment as a matter of law.

INTRODUCTION

Plaintiff EMCO Enterprises, Inc. (EMCO), one of numerous plaintiffs with similar claims pending in the Court of Claims,[1] brings this refund action under the former Single Business Tax Act (SBTA), [2] MCL 208.1 *et seq*. EMCO claims it is entitled to reduce its SBT liability for the 2005 through 2007 tax years by electing to apportion its income using an equally weighted, three-factor apportionment formula under the Multistate Tax Compact (Compact) provisions,

[1] All plaintiffs are claiming SBT refunds for at least one tax year between 2005 and 2006.
[2] The SBTA was repealed effective December 31, 2007. See 2006 PA 325.

MCL 205.581 *et seq.*,[3] rather than the three-factor apportionment formula mandated under the SBTA.

The primary arguments made in support of plaintiff's claim are: (1) the Compact is a binding interstate agreement that applies to the SBTA, a net income tax for Compact purposes, (2) the Department's denial of a taxpayer's right to make an apportionment election under the Compact is an unconstitutional impairment of a contract under the US Const, art I, § 10, and Michigan Const 1963, art 1, § 10, and (3) the Michigan Supreme Court's decision in *IBM*, 496 Mich 642, controls the disposition of this case. The validity of these claims in the context of the SBT has not yet been considered by a Michigan court.[4]

The principal question before the Court is exclusively a matter of law: whether the SBT apportionment formula for the tax years in question is mandatory or whether an SBT taxpayer may elect to apportion its tax base to Michigan using the Compact's equally weighted, three-factor apportionment formula.

BACKGROUND

I. Apportionment under the Michigan Single Business Tax

[3] Section 1 of 1969 PA 343, codified under MCL 205.581 *et seq*., includes the provisions of the Compact originally enacted by parties to the Compact (Member States).

[4] The validity of similar arguments in the context of the Michigan Business Tax Act (MBTA), MCL 208.1101, *et seq*., was addressed on July 14, 2014, by the Michigan Supreme Court in *IBM*, 496 Mich 642. Finding that the Legislature in adopting the MBTA did not repeal by implication the three-factor apportionment formula as set forth in MCL 205.581 *et seq*., the Court concluded that the taxpayer was entitled to use the Compact's three-factor apportionment formula in calculating its 2008 taxes. The Court also found that the Modified Gross Receipts Tax (MGRT) portion of the MBT was an "income tax" for Compact purposes. On September 11, 2014, in response to *IBM*, the Legislature enacted 2014 PA 282, which retroactively repealed the Compact provisions under MCL 205.581 *et seq*., to January 1, 2008, and mandated the use of a single-factor apportionment factor for purposes of calculating MBT. While the case presents many of the same underlying issues as were before the Court in *IBM*, the decision here involves a different tax regime (i.e., the SBTA) that preceded the MBTA as enacted under 2007 PA 36.

A. Initial Uniform Method of Apportionment

From January 1, 1976, until the SBTA's repeal effective December 31, 2007, entities with "business activity" in Michigan were subject to the SBT.[5] Enacted as a replacement for seven different business taxes, the SBT was an "addition-method" value-added tax (VAT) that required taxpayers to calculate a tax base by starting with federal taxable income (that is, net profits), adding back compensation, depreciation and other factors, and making certain other adjustments.[6]

Under the SBTA, a taxpayer with business activity both within and without Michigan is required to apportion its tax base as provided under Chapter 208.[7] Under Chapter 208, a three-factor apportionment formula is applied to the tax base to arrive at that portion of the base that is apportioned to Michigan.[8] Throughout its history, the SBT was calculated by using a three-factor apportionment formula consisting of payroll, property, and sales. Initially, just as it had been under the former business activity tax (BAT) (1954-1966),[9] and the former corporate income tax (CIT) (1967-1975),[10] the SBT apportionment formula was a traditional, three-factor apportionment formula that equally weighted property, payroll, and sales.

By the time the SBTA was adopted, an equally weighted apportionment formula was almost universal among states with business activity taxes.[11] The formula, based on a model

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[5] See 1975 PA 228; 2006 PA 325.
[6] *Trinova Corp*, 498 US at 366-367.
[7] MCL 208.41.
[8] MCL 208.45, MCL 208.45a.
[9] The BAT moved to an equally weighted three-factor apportionment formula in 1954. See MCL 205.553, as amended by 1954 PA 17.
[10] 1967 PA 281.
[11] Starting in 1957, when UDITPA adopted a model of three-factor apportionment formula based on the equal weighed proportion of property, payroll, and sales in a particular state, there was a general consensus that this formula was the most equitable way of dividing up a multistate

formula promulgated in the late 1950s under the Uniform Division of Income for Tax Purposes Act (UDITPA),[12] represented what was widely considered the most equitable way to apportion income of a multistate business. Under this model, if every state cooperates by adopting the same apportionment formula, no more than 100% of a multistate business's income is ever taxed, and each state is assured of receiving its fair share of the multistate taxpayer's income.[13] Conversely, to the extent that formulas among states are inconsistent, the possibility exists that either more than 100% or less than 100% of a multistate business's income could be subject to state income tax.[14] A guiding principle behind the development of the basic property-payroll-sales apportionment formula under UDITPA was a desire to achieve a long-term, overall fair and uniform system of state taxation based on cooperation among states.[15]

B. Deviations of Apportionment Formulas

Over time, more and more states began to move away from a uniform approach to state taxation. Legislatures, looking to maximize state revenues, began to abandon the equally weighted three-factor apportionment formula in favor of a more advantageous, heavily-weighted sales factor.[16] There were two primary reasons that budget-strapped states began to change

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taxpayer's income among states. See UDITPA, Hist and Pref Notes, 7A ULA 141-2 (2002). The UDITPA formula was later adopted under the Compact. See discussion, below.

[12] The constitutionality of the SBTA's three-factor apportionment formula was upheld in *Trinova Corp*, 498 US 358.

[13] Anand & Sansing, *The Weighting Game: Formula Apportionment as an Instrument of Public Policy*, Nat'l Tax J, Vol 53 No 2 (June 2000) at 183.

[14] *Id*.

[15] Mazerov, *The Single Sales Factor Formula for State Corporate Taxes – A Boon to Economic Development or a Costly Giveaway*?, Center on Budget and Policy Priorities (September 1, 2005), p 13, available at <http://www.cbpp.org/files/3-27-01sfp.pdf> (last visited April 6, 2015). This same desire led to enactment of the Compact. See discussion, below.

[16] After the United States Supreme Court upheld as constitutional Iowa's single factor sales-only apportionment factor in *Moorman Mfg Co v Bair*, 437 US 237; 98 S Ct 2340; 57 L Ed 2d 197 (1978), states were assured that formulas other than three-factor, equal weighted apportionment formulas were constitutional and began more heavily weighting the sales factor.

apportionment formulas. First, by increasing the weight of the sales factor, the tax burden generally shifts from in-state taxpayers with heavy property and payroll in the state, to out-of-state taxpayers with relatively little property and payroll in the state. This tends to result in an immediate tax cut for in-state companies exporting to other state and an immediate tax increase for out-of-state companies importing goods into a state.[17] The second justification for more heavily weighting the sales factor is to provide an economic incentive for an out-of-state taxpayer to increase its property and payroll in a particular state, thereby reducing a taxpayer's apportionment fraction in the state, and consequently the overall tax that had to be paid.[18]

Reflecting a trend across the country, Michigan abandoned uniform apportionment in 1991 when the legislature made a decision to more heavily weight the sales factor.[19] Subsequent legislatures continued to amend the SBT apportionment formula, each time resulting in a more heavily weighted sales factor.[20] Below is a timeline of the SBT apportionment formulas.[21]

SBT Apportionment Formula Weights

Tax Year Beginning	**Property**	**Payroll**	**Sales**
December 31, 1990 and earlier[22]	33.3%	33.3%	33.3%
January 1, 1991 – December 31, 1992[23]	30%	30%	40%
January 1, 1993 – December 31, 1996[24]	25%	25%	50%

[17] See Pomp, *The Future of the State Corporate Income Tax: Reflections (and Confessions) of a Tax Lawyer*, 16 State Tax Notes 939 (Mar 22, 1999), p 942.
[18] *Id*.
[19] See 1991 PA 77.
[20] The driving forces behind these changes were large in-state companies with significant property and payroll in the state, and high percentages of exported, non-Michigan sales. See Lane, *SBT Formula Goes to a Vote*, Crain's Detroit Business, p 37 (Oct 2, 1995).
[21] Not at issue here are SBTA's separate apportionment formulas for tax bases derived principally from transportation, financial, or insurance carrier services or specifically allocated.
[22] See 1975 PA 228, MCL 208.45(1).
[23] See 1991 PA 77; MCL 208.45(2).
[24] See 1991 PA 77; MCL 208.45(4).

January 1, 1997 – December 31, 1998[25]	10%	10%	80%
January 1, 1999 – December 31, 2005[26]	5%	5%	90%
January 1, 2006 – December 31, 2007[27]	3.75%	3.75%	92.5%

The formula for arriving at the Michigan portion of the SBT tax base, and whether SBT taxpayers were required to use such formulas for the tax years beginning in 2005, 2006 and 2007, form the basis of this dispute.

II. The Multistate Tax Compact

A. Adoption of the Compact

In 1969, Michigan adopted the Compact provisions, effective in 1970, through enactment of 1969 PA 343. The Compact itself was drafted in 1966 in response to the threat of federal intervention over matters of state income tax,[28] and went into effect in 1967 when seven states adopted the Compact provisions.[29] By 1972, 21 states had adopted the Compact to become Member States.[30] There are currently 16 Member States.[31] Michigan is a sovereignty member

[25] See 1995 PA 283; MCL 208.45(1).
[26] See 1995 PA 283; MCL 208.45(6), MCL 208.45a(1).
[27] Prior to the SBTA's repeal, the formula was set to move to 2.5% property. 2.5% payroll, and 95% sales on January 1, 2008. See 2005 PA 295; MCL 208.45a(2). Under the MBTA, effective Jan. 1, 2008, the formula consisted of 0% property, 0% payroll, and 100% sales. See 2007 PA 77.
[28] The federal legislation, which was never enacted, was introduced in the wake of the United States Supreme Court's decision in *Northwestern States Portland Cement Co v Minnesota*, 358 US 450; 79 S Ct 357, 3 LEd2d 421 (1959), holding that there is no Commerce Clause barrier to the imposition of a direct income tax on a foreign corporation carrying on interstate business within a taxing state.
[29] *US Steel Corp v Multistate Tax Comm'n*, 434 US 452, 454; 98 S Ct 799; 54 L Ed 2d 682 (1978).
[30] *Id*.
[31] See <http://www.mtc.gov/The-Commission/Member-States> (lasted visited March 21, 2015). Michigan was a Compact member prior to January 1, 2008 when it retroactively repealed the Compact provisions. *See* 2014 PA 282.

and participates in general activities of the Commission.[32] The Compact was never approved by Congress.[33]

B. Compact Provisions

1. Compact Purpose

The original purposes of the Compact included: (1) "[f]acilitat[ing] proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes," (2) "[p]romot[ing] uniformity or compatibility in significant components of [state] tax systems," (3) "[f]acilitat[ing] taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration," and (4) "[a]void[ing] duplicative taxation."[34]

2. The Commission

The Compact, through Article VI, established the Multistate Tax Commission (Commission).[35] The powers of the Commission are (1) to study state and local tax systems, (2) to develop and recommend proposals for greater uniformity, and (3) to compile information helpful to the states.[36] While the Commission also has powers to draft rules and regulations,

[32] *Id.* ("Sovereignty members are states that support the purposes of the Multistate Tax Compact through regular participation in, and financial support for, the general activities of the Commission. These states join in shaping and supporting the Commission's efforts to preserve state taxing authority and improve state tax policy and administration.") Michigan was a Compact member prior to January 1, 2008 when it retroactively repealed the Compact provisions. *See* 2014 PA 282.

[33] Though not Congressionally approved, the Compact was upheld against constitutional challenges in *US Steel*, 434 US 452.

[34] MCL 205.581, Art I.

[35] MCL 205.581, Art VI(1).

[36] MCL 205.581, Art VI(3).

each state "retains complete freedom to adopt or reject the rules and regulations of the Commission."[37]

3. Compact Apportionment and Election Provisions

Article IV of the Compact incorporates UDITPA's three-factor apportionment formula based on equally weighted property, payroll, and sales factors.[38] The Compact's elective provision under Article III provides that "[a]ny taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in two or more party states may elect to apportion and allocate his income in the manner provided by the laws of such states or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV."[39]

4. Miscellaneous Compact Provisions

A state can withdraw from the Compact "by enacting a statute repealing the same."[40] In addition, as noted above, each state retains freedom under the Compact to "adopt or reject" the Commission's rules and regulations.[41]

5. Repeal of the Compact

On September 11, 2014, in response to *IBM*, the Legislature enacted into law 2013 SB 156 (SB 156) as 2014 PA 282. This law retroactively repealed the Compact provisions under MCL 205.581 *et seq*., to January 1, 2008, and mandated the use of a single-factor apportionment

[37] *US Steel Corp*, 434 US at 473.
[38] MCL 205.581, Art IV(1). See also Pomp, *Reforming a State Corporate Income Tax*, J of State Taxation (Spring 2014), p 21.
[39] MCL 205.581, Art III(1).
[40] MCL 205.581, Art X(2).
[41] *US Steel*, 434 US at 473.

factor for purposes of calculating Michigan Business Tax (MBT) [42] and the CIT. The Legislature gave the act retroactive effect by providing as follows:

> Enacting section 1, 1969 PA 343, MCL 205.581 to 205.589, is repealed retroactively and effective beginning January 1, 2008. It is the intent of the legislature that the repeal of 1969 PA 343, MCL 205.581 to 205.589, is to express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and the intended effect of that section to eliminate the election provision included within section 1 of 1969 PA 343, MCL 205.581, and that the 2011 amendatory act that amended section 1 of 1969 PA 343, MCL 205.581, was to further express the original intent of the legislature regarding the application of section 301 of the Michigan business tax act, 2007 PA 36, MCL 208.1301, and to clarify that the election provision included within section 1 of 1969 PA 343, MCL 205.581, is not available under the income tax act of 1967, 1967 PA 281, MCL 206.1 to 206.713.

PA 282 thus amended the MBT to express the "original intent" of the Legislature with regard to (1) the repeal of the Compact provisions, (2) application of the MBT's apportionment provision under MCL 208.1301, and (3) the intended effect of the Compact's election provision under MCL 205.581. The effect of the amendments, as written, retroactively eliminates a taxpayer's ability to elect a three-factor apportionment formula in calculating tax liability under both the MBT and CIT. The explicit repeal under PA 282 did not extend to the SBTA.

LEGAL ANALYSIS

I. IS THE SBT AN "INCOME TAX" WITHIN THE MEANING OF THE COMPACT?

The threshold issue that must be decided by the Court is whether the SBT is an "income tax" within the meaning of the Compact.[43] Article III of the Compact provides that with respect to a state "income tax," a taxpayer may elect to apply the Compact's equally weighted three-

[42] MCL 208.1101, *et seq*.

[43] The Court's determination is limited to a finding of whether or not the SBT is an income tax for purposes of the Compact. On the issue whether the SBT is an income tax in other contexts, see *Trinova Corp*, 498 US 358, and *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 310; 497 NW2d 595 (1993).

factor formula in lieu of the state's apportionment formula.[44] "Income tax" under the Compact is interpreted broadly,[45] and is defined as:

> [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.[46]

The Court's primary goal in statutory interpretation is "to ascertain and give effect to the Legislature's intent."[47] In so doing, the Court "should first look to the specific statutory language to determine the intent of the Legislature, which is presumed to intend the meaning that the statute plainly expresses."[48]

In calculating the SBT, the tax base starts with federal taxable income.[49] Federal taxable income is gross income minus allowable deductions under the federal tax code.[50] Allowable deductions from gross income include ordinary, necessary *expenses* paid or incurred in the carrying of a trade or business.[51] The SBT then expands the income tax base by adding back some, but not all, of the federal expense deductions taken to arrive at federal taxable income.[52] For example, except for compensation, most ordinary and necessary business expenses incurred in the carrying on of a trade or business are deducted from gross income to arrive at federal

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[44] MCL 205.581, Art III(1).
[45] See *IBM*, 496 Mich at 667 (opinion by VIVIANO, J.), explaining that the Modified Gross Receipts Tax component of the Michigan Business Tax was an "income tax" under the Compact because the tax base started with gross income and subtracted expenses not specifically and directly related to a particular transaction.
[46] MCL 205.581, Art II(4).(emphasis added).
[47] *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219, 223; 779 NW2d 304 (2009).
[48] *Id*. (internal quotation marks and citations omitted.).
[49] The tax base "means business income." MCL 208.9(1). "Business income" is defined generally as "federal taxable income." MCL 208.3(3).
[50] *Mobil Oil Corp v Dep't of Treasury*, 422 Mich 473, 496-497; 373 NW2d 730 (1985).
[51] IRC § 162(a) (emphasis added).
[52] MCL 208.9(2) through 208.9(6). Certain subtractions from federal taxable income are also required. See MCL 208.9(9), 208.9(10).

taxable income, but are not added back as part of the SBT tax base.[53] The resulting tax is thus in part measured by "an amount arrived at by deducting expenses from gross income" for purposes of defining income tax under the Compact.[54] That some expenses such as compensation are also added back to the SBT tax base before the tax is calculated does not alter the conclusion that the SBT is "*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." Under the plain language of the Compact, it is therefore an income tax for Compact purposes.

A finding that the SBT is an income tax for Compact purposes is also consistent with the Court's finding in *IBM* that the Modified Gross Receipts Tax (MGRT) portion of the MBT "fits within the broad definition of 'income tax' under the Compact by taxing a variation of net income. . . ."[55] The SBT and the MGRT, in a broad sense, are similar taxes in that they both have a "value added" component that is distinct from a tax based purely on income.[56] That these taxes are not inherently "income taxes" is reflected in nearly identical provisions under both the SBTA and the MGRT stating that "[t]he tax levied under this section and imposed is upon the privilege of doing business and *not upon income*."[57] Despite the Legislature's words that the MGRT is not a tax imposed upon income, the Court in *IBM* declined to "put a definitive label on the MGRT" [58] and unanimously found that the MGRT was an income tax for the broad purposes

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[53] *Id*.
[54] MCL 205.581, Art II(4).
[55] *IBM*, 496 Mich at 667 (opinion by VIVIANO, J.).
[56] McIntyre & Pomp, *A Policy Analysis of Michigan's Mislabeled Gross Receipts Tax*, 53 Wayne L Rev 1275, 1281 (2008).
[57] See MCL 208.31(4). MCL 208.1203 provides that "[t]he tax levied and imposed under this section is upon the privilege of doing business *and not upon income or property*. (Emphasis added).
[58] *IBM*, 496 Mich at 663 n 70 (opinion by VIVIANO, J.).

of the Compact.[59] Likewise the Court here finds that the SBT is an income tax for these same broad purposes.

It should be noted that the neither the SBT nor the MGRT are treated income taxes for all purposes. For example, in *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 309; 497 NW2d 595 (1993), the Court of Appeals found that the SBT is not an income tax because it is not "measured by net income" for purposes of PL 86-272, a federal law that protects certain activities of an out-of-state business from triggering income tax "nexus" with a state. Similarly, neither is the MGRT subject to PL 86-272.[60] This is so because the MGRT, like the SBT, is not "measured by net income" for purposes of PL 86-272. Nonetheless, just as the Court in *IBM* chose to interpret the Compact's definition broadly[61] and found that the MGRT "fits within the broad definition of 'income tax' under the Compact by taxing a variation of net income . . . ,"[62] the Court reaches the same conclusion here with respect to the SBT.

II. IS THE COMPACT BINDING ON SUBSEQUENT LEGISLATURES?

The Court now addresses whether the Compact bound future legislatures under either federal compact law or Michigan law.

A. THE COMPACT LACKS THE "CLASSIC INDICIA" OF A BINDING INTERSTATE COMPACT UNDER FEDERAL COMPACT LAW

The United State Supreme Court has recognized that not all interstate compacts are binding contracts that restrict future legislatures. See *Northeast Bancorp, Inc v Bd of Governors*, 472 US 159; 105 S Ct 2545; 86 L Ed 2d 112 (1985). While a Congressionally-approved

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[59] *IBM*, 496 Mich at 663 (opinion by VIVIANO, J.), 668 (ZAHRA, J., concurring), 672 n 3 (MCCORMACK, J., dissenting).

[60] See the Department's Revenue Administrative Bulletin 2008-4, p 5-6, making clear that PL 86-272 does not apply to the MGRT portion of the MBT, but only to the business income tax (BIT) portion of the MBT.

[61] See *IBM*, 496 Mich at 667 (opinion by VIVIANO, J.).

[62] *Id*.

interstate compact has the force of federal law and is binding on Member States,[63] an interstate compact that has not been approved by Congress, such as the Compact here, can be either a *binding* interstate compact or merely an *advisory* compact.[64]

The test for distinguishing between an advisory compact and a binding interstate compact is set forth in *Northeast Bancorp*, as further explained in *Seattle Master Builders Ass'n v Pacific Northwest Electric Power*, 786 F2d 1359, 1363 (CA 9, 1986). The three "classic indicia" of a binding interstate compact are: (1) the establishment of a joint regulatory body, (2) the requirement of reciprocal action for effectiveness, and (3) the prohibition of unilateral modification or repeal. *Northeast Bancorp*, 472 US at 175; *Seattle Master Builders*, 786 F2d at 1363. Looking at the three indicia of a binding interstate compact, the Compact has none of these features and is more properly characterized as a non-binding advisory compact.

1. The Compact did not establish a joint regulatory agency

A hallmark of an advisory compact, as opposed to a binding contract, is that advisory compacts "cede no state sovereignty nor delegate any governing power to a compact-created agency."[65] When the Compact, through Article VI, established the Commission,[66] no governing or regulatory powers were conferred. Enumerated in Article VI, the powers of the Commission are (1) to study state and local tax systems, (2) to develop and recommend proposals for greater

[63] The Compact Clause of the United States Constitution, art I, §10, cl 3, provides, "No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another State . . . ."

[64] Advisory interstate compacts have no formal or regulatory enforcement mechanisms and are intended to study and make recommendations on interstate problems. Broun, et al, The Evolving Use and the Changing Role of Interstate Compacts: A Practitioner's Guide (2006), p 13.

[65] *Id*. at 14.

[66] MCL 205.581, Art VI.

uniformity, and (3) to compile information helpful to the states.[67] None of these purposes is regulatory, and it in no way indicates a delegation of sovereign authority to tax.

The conclusion that the Compact did not cede state authority or governing power to the Commission was expressly acknowledged by the Court in *US Steel Corp v Multistate Tax Comm*, 434 US 452, 473; 98 S Ct 799; 54 L Ed 2d 682 (1978):

> [The Compact] does not purport to authorize the Member States to exercise any powers they could not exercise in its absence. *Nor is there any delegation of sovereign power to the Commission; each State retains complete freedom to adopt or reject the rules and regulations of the Commission.* [Emphasis added.]

In summary, the Compact, by its terms, does not create a regulatory body.

2. The Compact does not require reciprocal action

There is nothing reciprocal about the Compact's provisions. Each member state operates its respective tax systems independently from the tax systems of other Member States, and the determination of tax in one state is generally independent of the determination in another state. With respect to apportionment formulas, in particular, Articles III(1) and IV's application in one member state has no bearing on another state. And the functionality of one member state's apportionment methodology does not hinge on whether another member state's apportionment methodology is reciprocal in nature. As the Supreme Court recognized in *Moorman Mfg Co v Bair*, 437 US 267, 274; 98 S Ct 2340; 57 L Ed 2d 197 (1978), "the States have wide latitude in the selection of apportionment formulas . . . ." Consistent with *Moorman*, a Member State's decision to allow or eliminate a certain apportionment formula is unaffected by the choice of formula that another member state has made.

3. The Compact allows unilateral withdrawal and modification

[67] MCL 205.581, Art VI(3).

Under the express terms of the Compact, Member States are free to unilaterally withdraw at any time without notice to another member state.[68] Thus unilateral *withdrawal* is clearly permitted under the Compact.

Whether unilateral *modification* is permitted under the Compact is less clear and not directly addressed under the Compact. However, three factors lead to a conclusion that Member States did not intend to restrict their ability to vary terms of the Compact. First, as pointed out recently by the United States Supreme Court, "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence."[69] Because there is no such "clear indication" under the terms of the Compact that states are prevented from asserting their sovereign powers to legislate and vary the Compact's terms, it is reasonable to conclude that the parties were free to unilaterally amend the Compact provisions, including Articles III(1) and IV.

Second, language in the Compact that it "shall be liberally construed as to effectuate the purposes thereof," supports an interpretation that flexibility in administering Compact provisions was contemplated.[70]

Third, the Member States' course of performance shows that unilateral amendments to or withdrawals from the Compact have long been accepted. As pointed out by the dissent in *IBM*, 496 Mich at 681-682, "[M]ember [S]tates did *not* view strict adherence to Articles III and IV as a

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[68] MCL 205.581, Art X(2) ("Any party state may withdraw from this compact by enacting a statute repealing the same.) See also *US Steel*, 434 US at 473 ("[E]ach State retains complete freedom to adopt or reject the rules and regulations of the Commission.")

[69] *Tarrant Regional Water Dist v Herrmann*, ___ US ___; 133 S Ct 2120, 2133; 186 L Ed 2d 153 (2013).

[70] MCL 205.581, Art XII.

binding contractual obligation, as Compact members have deviated from the Compact's election and apportionment formula without objection from other members."[71] Moreover,

> [i]t bears emphasizing that Compact members have not only refrained from bringing legal action against one another for deviating from Articles III and IV, they have endorsed the Commissioner's interpretation of the Compact: in the *Gillette* [*Co v Franchise Tax Bd*, 151 Cal Rptr 3d 106; 291 P3d 327 (2013)] litigation, all of the member states jointly filed an amicus brief urging the Supreme Court of California to reject the lower court's construction of the Compact as a binding contract. [*IBM*, 496 Mich at 682 n 7 (MCCORMACK, J., dissenting).]

Because the Compact fails to create a regulatory body, contemplates no reciprocal actions, and contains no bar to unilateral deviations or repeal, the Court concludes that none of the "classic indicia" of a binding compact exist. Rather than a binding interstate contract, it is more properly interpreted as an advisory compact that did not act to bind future legislatures.

B. THE COMPACT IS NOT A BINDING CONTRACT UNDER MICHIGAN LAW

Because it was not congressionally-approved, the Compact is governed by state law.[72] Michigan law therefore governs the interpretation of the Compact.

In Michigan, there is a "strong presumption that statutes do not create contractual rights."[73] In addition, "[i]n order for a statute to form the basis of a contract, the statutory language must be plain and susceptible of no other reasonable construction than that the

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[71] As summarized in Hellerstein & Hellerstein, State Taxation (2014), the course of performance of states with regard to the Compact provisions generally, and the elective apportionment provisions specifically, shows that unilateral repeal and modifications to the Compact provisions have been widespread.

[72] See *Doe v Young Marines of The Marine Corps League*, 277 Mich App 391, 399; 745 NW2d 168 (2007) (finding that Michigan courts are not bound to follow a federal court's interpretation of state law.) See also *McComb v Wambaugh*, 934 F2d 474, 479 (CA 3, 1991) (finding that because a non-Congressionally approved compact does not express federal law, it must be construed as state law.)

[73] *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 661; 698 NW2d 350 (2005).

Legislature intended to be bound to a contract."[74] As noted in the dissent in *IBM*, "[t]his presumption is grounded in the principle that 'surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments.' "[75]

There are no words in the Compact, as adopted by the Legislature under 1969 PA 343, that indicate that the state intended to be bound to the Compact, and specifically to Article III(1). Therefore, the presumption must be that the state did not surrender its legislative power to require use of a particular apportionment formula. Such interpretation comports with the Supreme Court's recognition of "the basic principle[] that the States have wide latitude in the selection of apportionment formulas . . . ."[76] This interpretation is also consistent with the Court's recent acknowledgment that states "do not easily cede their sovereign powers . . . ."[77] Because there is no clear indication under MCL 205.581 that the state contracted away its ability to either select an apportionment formula that differs from the Compact, or to repeal the Compact altogether, this Court concludes that no contractual obligation was created by enactment of 1969 PA 343.[78]

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[74] *Id.* at 662 (quotation marks and citation omitted).
[75] *IBM*, 496 Mich at 682 (MCCORMACK, J., dissenting), quoting *Studier*, 472 Mich at 661.
[76] *Moorman*, 437 US at 274.
[77] *Tarrant*, 133 S Ct at 2132.
[78] Even if the Compact could somehow be construed as a binding contract under Michigan law, the Member States' course of performance supports a determination that Member States either waived or modified the Compact's terms under Articles III(1) and IV, or materially breached the terms under Articles III(1) and IV well before the repeal of the Compact provisions under PA 282. In addition, as suggested in the dissenting opinion in *IBM*, taxpayers would have no standing to enforce the terms of any purported contract that was made with Member States.

> [I]t is not entirely clear to me why IBM has standing to enforce the Compact as a contract, given that IBM is neither a party to the Compact nor is it clear that they were intended as a third-party beneficiary. See *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422; 670 NW2d 651 (2003); MCL 600.1405. In any event, because

C. BECAUSE NO BINDING CONTRACT WAS CREATED UNDER FEDERAL OR STATE LAW, THE LEGISLATURE WAS FREE TO MANDATE THE USE OF APPORTIONMENT FORMULAS THAT DEVIATED FROM THE COMPACT

Generally, legislatures have the power to repeal existing legislation and are not bound by the acts of prior legislatures, so long as existing contractual obligations are not impaired.[79] The principle that one legislature cannot bind a succeeding legislature is thus derived from the constitutional power of the Legislature to legislate.[80] As discussed earlier, no contract was created by enactment of the Compact provisions. Therefore, the Legislature's constitutional right to change, amend, or repeal the law could not be restricted by enactment of 1969 PA 343,[81] and the Legislature acted within the scope of its legislative powers as vested in it by the Michigan Constitution when it amended the SBTA to mandate apportionment provisions that deviated from the Compact.

III. DO THE COMPACT ELECTIVE PROVISION AND THE SBTA'S MANDATED APPORTIONMENT PROVISIONS APPARENTLY CONFLICT, AND IF SO, CAN THEY BE HARMONIZED?

Having found that future legislatures were not bound by the Compact, the Court must now decide whether the Compact elective provision and the SBT apportionment formulas are in apparent conflict during the relevant tax years in question, and if so, whether they can be

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> I conclude that no such contractual relationship was formed, I find it unnecessary to address this issue *sua sponte*. [*IBM*, 496 Mich at 681 n 5 (MCCORMACK, J., dissenting).]

[79] See, e.g., *Studier*, 472 Mich at 660; *LeRoux v Secretary of State*, 465 Mich 594, 615-616; 640 NW2d 849 (2002). See also *Atlas v Wayne Co Bd of Auditors*, 281 Mich 596, 599; 275 NW 507 (1937) ("The power to amend and repeal legislation as well as to enact it is vested in the legislature, and the legislature cannot restrict or limit its right to exercise the power of legislation by prescribing modes of procedure for the repeal or amendment of statutes; nor may one legislature restrict or limit the power of its successors.")

[80] Const 1963, art 4, § 1.

[81] *Studier*, 472 Mich at 660.

harmonized. If the statutes are in conflict and cannot be reconciled, the Court must give effect to the later enacted and more specific statute, and find that the Legislature repealed the earlier enacted statute by implication.[82]

A. WHETHER THE STATUTES ARE IN APPARENT CONFLICT

The SBTA directs that "[a] taxpayer whose business activities are taxable both within and without this state, *shall* apportion his tax base as provided in this chapter."[83] Under Chapter 208 of the Michigan Compiled Laws, the SBTA provides for a three-factor formula for apportioning the tax base to Michigan.[84] The three factors, property, payroll, and sales, are each multiplied by a separately stated percentage, and the results are then added together to determine the apportionment factor.[85] For 2005, the formula was the sum of the following percentages: (1) the property factor multiplied by 5%, (2) the payroll factor multiplied by 5%, and (3) the sales factor multiplied by 90%.[86] For 2006 and 2007, the formula was the sum of the following percentages: (1) the property factor multiplied by 3.75%, (2) the payroll factor multiplied by 3.75%, and (3) the sales factor multiplied by 92.5.[87]

The Compact states, in pertinent part:

> (1) Any taxpayer subject to an income tax whose income is subject to apportionment and allocation for tax purposes pursuant to the laws of a party state or pursuant to the laws of subdivisions in two or more party states may elect to apportion and allocate his income in the manner provided by the laws of such state or by the laws of such states and subdivisions without reference to this compact, or may elect to apportion and allocate in accordance with article IV. . . .[88]

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[82] *Jackson v Mich Corrections Comm'n*, 313 Mich 352, 357; 21 NW2d 159 (1946).
[83] MCL 208.41 (emphasis added).
[84] MCL 208.45; MCL 208.45a.
[85] *Id.*
[86] 1995 PA 283; MCL 208.45(6), MCL 208.45a(1).
[87] 2005 PA 295; MCL 208.45a(2).
[88] MCL 205.581, Art III(1).

Article IV of the Compact incorporates UDITPA's three-factor apportionment formula based on equally weighted factors and consists of the sum of the following percentages: (1) the property factor multiplied by 33.3%, (2) the payroll factor multiplied by 33.3%, and (3) the sales factor multiplied by 33.3%.[89]

The goal of statutory interpretation is to determine and give effect to the Legislature's intent.[90] "The words of a statute are the most reliable indicator of the Legislature's intent and should be interpreted according to their ordinary meaning and the context within which they are used in the statute."[91]

Looking to the specific language, the SBTA directs that that a multistate SBT taxpayer "*shall* apportion his tax base as provided in this chapter."[92] The word "shall" is used to designate a mandatory provision.[93] No other words are found within the SBTA that would otherwise provide a taxpayer with the discretion to use an apportionment formula outside of Chapter 208.[94] At the same time, the specific language of the Compact *permits* a taxpayer *to elect out* of an apportionment formula and apply an equally weighted, three-factor apportionment formula.[95] Because the SBTA during the tax years in question mandates the use of one apportionment formula, while the Compact provides for the discretionary use of another apportionment formula, the statutes are in apparent conflict.

B. WHETHER THE STATUTES CAN BE HARMONIZED

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[89] MCL 205.581, Art IV(1).
[90] *People v Smith*, 496 Mich 133, 138, 852 NW2d 127 (2014).
[91] *Id.*
[92] MCL 208.41 (emphasis added).
[93] *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013).
[94] Though not relevant here, under limited circumstances a taxpayer petition for, or the Department may require, an alternative apportionment method under the SBTA. See MCL 208.69.
[95] MCL 205.581, Art III(1) and IV.

In cases where the provisions of two statutes are in apparent conflict, as is the case here, and where the provisions relate to the same subject, as do the SBT apportionment provisions for the tax years in question and the Compact's elective provision, the Court must attempt to harmonize the statutes by reading them together *in pari materia*.[96] The process for attempting to harmonize two statutes was set forth by the lead opinion in *IBM*:

> The endeavor should be made, by *tracing the history of legislation* on the subject, *to ascertain the uniform and consistent purpose of the legislature, or* to discover how the *policy of the legislature with reference to the subject-matter has been changed or modified from time to time*. In other words, in determining the meaning of a particular statute, *resort may be had to the established policy of the legislature as disclosed by a general course of legislation*. With this purpose in view therefore it is proper to consider, not only acts passed at the same session of the legislature, but also *acts passed at prior and subsequent sessions.*[97]

In reference to the subject matter of apportionment formulas, it is thus the duty of this Court to read the conflicting statutes together and determine whether the Legislature had a "uniform and consistent purpose," or whether its policies with respect to apportionment have "been changed or modified from time to time."[98] The doctrine of *in pari materia* is not without restrictions, however, and "does not permit the use of a previous statute to control by way of former policy the plain language of a subsequent statute . . . ."[99]

1. History and General Course of Apportionment Legislation

As discussed below, the purpose and policies behind the Compact and equally weighted, three-factor apportionment formula, and the reasons why the Legislature eventually abandoned

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[96] *IBM*, 496 Mich at 652-653 (opinion by VIVIANO, J.), quoting *Rathbun v Michigan*, 284 Mich 521, 544; 280 NW 35 (1938). "Statutes *in pari materia* are those . . . which have a common purpose . . . ." *Id.*

[97] *IBM*, 496 Mich at 652-653 (opinion by VIVIANO, J.), citing *Rathbun*, 284 Mich at 543-544 (emphasis added; citation and quotation marks omitted.)

[98] *Id.*

[99] *Voorhies v Faust*, 220 Mich 155, 157-158; 189 NW 1006 (1922).

the formula and replaced it with a progressively heavier weighted sales factor, are key to resolving the issue of whether the statutes here can be harmonized.

When it was enacted into Michigan law in 1969, two of the Compact's stated purposes were to "[p]romote uniformity or compatibility in significant components of tax systems" and to "[a]void duplicative taxation."[100] At the time, Michigan had long since embraced a cooperative, unified approach to taxation, having adopted an equally weighted, three-factor apportionment formula in the 1950s under the BAT, and again in 1967 under the Income Tax Act ITA.[101] Thus the apportionment formulas of the ITA and the Compact were redundant, and the Compact's elective provision had no relevance to a multistate taxpayer seeking a more advantageous apportionment formula.

The Legislature's policy of adhering to an almost universal, uniform system of state taxation carried over to the SBTA as enacted in 1975.[102] Once again, just as the Legislature had done under the ITA, an equally weighted, three-factor apportionment formula was adopted from UDITPA.[103] And once again, because the apportionment formulas of the SBTA and the Compact were essentially mirror images of each other, the Compact's elective provision had no relevant application.

A turning point in Michigan tax policy occurred in 1991, when Michigan joined with many other states that had abandoned old tax policies based on cooperation, uniformity and

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[100] MCL 205.581, Art I(2), (4).

[101] By the late 1960s, nearly all states with a corporate income tax uniformly used equally weighted, three-factor apportionment formulas. McClure, *Understanding Uniformity and Diversity in State Corporate Income Taxes*, Nat'l Tax J, Vol LXI, No 1 (March 2008), p 156. As the Supreme Court observed in *Trinova Corp*, the equally weighted, three-factor apportionment factor had become "something of a benchmark against which other apportionment formulas are judged." *Trinova Corp*, 498 US at 380-381 (citation and quotation marks omitted).

[102] See 1969 PA 343, MCL 208.41, 45.

[103] See discussion above on UDITPA. See also *Reforming a State Corporate Income Tax*, J of State Taxation (Spring 2014) at 21.

equal weighting of apportionment factors and had begun to more heavily weight the sales factor.[104] For the first time since Michigan had adopted an equally weighted, three-factor apportionment formula in 1954,[105] the sales factor was now weighted more heavily.[106] The Legislature made subsequent changes to the SBT apportionment formula in 1995 and 2005, each time increasing the weight of the sales factor. Finally, in 2007 when the Legislature adopted the MBTA, the apportionment factor moved to a single factor apportionment formula based 100% on sales,[107] and that formula remains in effect under the CIT.[108]

2. Modifications of Legislature's Policies of Uniform Apportionment

The Legislature's policies behind these apportionment formula changes and why it chose to progressively move towards a more heavily weighted sales factor are relevant in the Court's attempt to read the statute *in pari materia*. The primary reason that Michigan departed from a uniform, agreed-upon apportionment formula was the same reason that other states abandoned equally weighted, three-factor apportionment: "to gain a competitive advantage – or to avoid a competitive disadvantage."[109] Legislative analyses of bills that increased the weight of the sales factor in SBT's apportionment support this rationale.

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[104] See also Mazerov, *The Single Sales Factor Formula for State Corporate Taxes – A Boon to Economic Development or a Costly Giveaway*?, Center on Budget and Policy Priorities (September 1, 2005), available at <http://www.cbpp.org/files/3-27-01sfp.pdf> (last visited April 6, 2015).

[105] 1954 PA 17.

[106] 1991 PA 77. As the revenue effect of this change, see *A Policy Analysis*, 53 Wayne L Rev at 1279 ("The result of this shift in weighting was to greatly reduce the tax on firms manufacturing entirely in Michigan for export whereas the tax on firms manufacturing outside the State for sale in Michigan was increased.")

[107] See 2007 PA 36, MCL 208.1301, 1303.

[108] 1967 PA 281, § 601, added by 2011 PA 38, effective Jan. 1, 2012, MCL 206.661, MCL 206.663(3).

[109] *Understanding Uniformity*, Nat'l Tax J, Vol LXI, No 1 at 152. Any question as to the constitutionality of a heavily weighted apportionment formula was settled by the Supreme Court in *Moorman*, 437 US 267 (upholding Iowa's single factor apportionment formula based on

Specifically, the legislative analysis under 1991 SB 69, the bill that led to the abandonment of equally weighted apportionment under the SBTA, reveals that the mandatory weighting of the sales factor was intended to benefit multistate companies headquartered in Michigan at the expense of "multistate firms that are principally based elsewhere but exploit Michigan markets."[110] Further, the change to a mandated apportionment formula with a heavily weighted sales factor "would serve as an inducement for capital-intensive businesses to locate here, while protecting Michigan home-based companies from other states that apportion to themselves a greater part of the companies' business activity."[111] And as warned in the opposing arguments of the same bill, "once the double-double [sales factor] apportionment formula took effect, more of the tax liability would be shifted to out-of-state firms."[112]

The Legislature's purpose in abandoning the 33.3% sales factor in 1991, as well as its purpose in progressively moving towards a 100% sales factor under the MBT and CIT, is well documented, and consistent with the purposes of most other states that have now abandoned the "benchmarked" uniform apportionment formula.[113] "[T]he Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws."[114] However, there is no rational way to conclude that the Legislature intended to abandon a uniform apportionment formula, mandate the use of a new formula designed to in part shift the tax burden to out-of-state taxpayers, and at the same time permit those same out-of-state taxpayers to elect

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sales.). This decision "opened the floodgates for states wanting to change their apportionment formulas for competitive reasons." *Understanding Uniformity*, Nat'l Tax J, Vol LXI, No 1 at 152.

[110] Senate Legislative Analysis, SB 69 (Substitute S-13 as passed by the Senate), June 13, 1991, p 6.

[111] *Id.*

[112] *Id.*

[113] See generally, *Understanding Uniformity*, Nat'l Tax J, Vol LXI, No 1.

[114] *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993), citing *Malcolm v East Detroit*, 437 Mich 132, 139, 468 NW2d 479 (1991).

back in to the old apportionment formula. And there would otherwise have been no point in changing the apportionment formula to encourage out-of-state firms to increase their property and payroll in Michigan, and no incentive provided to such companies to do so, if an election could be made to disregard the heavily-weighted statutory formula.

Further, the fact that the Legislature changed the weight of the apportionment formula's sales factor multiple times over the course of almost 16 years *without once* making reference to the Compact's elective provision in the bills or legislative analyses, is strong evidence that the uniform principle of state taxation adopted by the state in 1954 and reaffirmed by its adoption of the Compact in 1969, no longer had a place in the state's apportionment policy. This silence also gives meaning and understanding to what the Legislature intended to accomplish when it first abandoned uniform apportionment in 1991 and continued to more heavily weight the sales factor until adopting a single sales factor formula in 2007 under the MBTA.

In light of the " 'established policy of the legislature as disclosed by a general course of legislation,' "[115] and the prohibition against "use of a previous statute to control by way of former policy the plain language of a subsequent statute,"[116] the Court concludes that the SBTA's mandated apportionment provision for the tax years in question and the Compact's elective provision cannot be harmonized.

C. IMPLIED REPEAL OF FORMER STATUTE BY ENACTMENT OF THE LATER STATUTE

Finally, where two statutes are irreconcilable and cannot be harmonized, "as a general rule, a more recently enacted statute takes precedence over an earlier one, especially if the more

[115] *IBM*, 496 Mich at 652-653 (opinion by VIVIANO, J.), (citation omitted).
[116] *Voorhies*, 220 Mich at 157-158.

recent one is also more specific."[117] Further, unless the subsequent act was intended as a complete substitute of the first, " '[t]he rule is that the latter act operates *to the extent of the repugnancy,* as a repeal of the first . . . .' "[118] As discussed above, the SBTA and the Compact irreconcilably conflict to the extent of the mandated post-1990 SBT apportionment provision and the Compact's elective provision. Therefore the SBTA's apportionment provision controls, and as of January 1, 1991, must be considered a repeal of the Compact's elective provision.[119]

The Court acknowledges that there is a strong presumption against implied repeals.[120] However, "[they] do happen, and, when clear, must be given effect."[121] In addition, the presumption against implied repeal is weakened where the question involves an obscure, forgotten statute.[122] The Compact elective provision is one such statute.[123] The elective provision essentially lay dormant and was of no use from its January 1, 1970 effective date through December 31, 1990, because during that time period the ITA and SBTA's mandated

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[117] *City of Kalamazoo v KTS Indus, Inc*, 263 Mich App 23, 34-35; 687 NW2d 319 (2004) (citation omitted).
[118] *Jackson*, 313 Mich at 357 (citation omitted).
[119] The Court limits its decision to the implied repeal of the Compact's elective provision only, and not to the repeal of the entire Compact which was made through 2014 PA 282, effective January 1, 2008. As noted earlier, the Court rejects any arguments made that the legislatures subsequent to 1969 were not free to vary the terms of the Compact, or that repeal of the Compact could only be made on an "all or nothing" basis. For a contrary view, see *Gillette Co v Franchise Tax Bd*, 209 Cal App 4th 938; 147 Cal Rptr 3d 603 (2012), review granted and opinion superseded sub nom *Gillette v Franchise Tax Bd*, 151 Cal Rptr 3d 106; 291 P3d 327 (2013) (". . . the plain language of the withdrawal provision, enabling a party state to withdraw from the Compact 'by enacting a statute repealing the same,' allows only for complete withdrawal from the Compact. . . . Faced with the desire to escape an obligation under the Compact, a state's only option is to withdraw completely by enacting a repealing statute.")
[120] *Jackson*, 313 Mich at 356.
[121] *Id*. at 357 (internal citations omitted.)
[122] 1A Sutherland Statutory Construction § 23:26 (7th ed), p 535, citing *W L Mead, Inc v Int'l Bros of Teamsters*, 217 F2d 6, 9 (CA 1, 1954). (The presumption against implied repeal carries less weight where the earlier statute is an "obscure and generally forgotten" one.)
[123] See Herbert & Mayster, *The Multistate Tax Compact -- A Promise Forgotten*, 66 State Tax Notes 597 (2012).

apportionment formulas were the same as under the Compact. When the Legislature later changed the apportionment formula to more heavily weight the sales factor in 1991, 1995, 2005 and 2007, there is no evidence in the legislative analyses to suggest that the Legislature gave any consideration to the dormant elective provision of the Compact or to the potential fiscal impact of a taxpayer electing out of a mandated apportionment formula. What *is* clear from the legislative analyses is that the Legislature anticipated that by changing the apportionment formula to more heavily weight the sales factor, companies with significant sales in Michigan, but with little physical presence in the state, would "experience a substantial tax increase."[124] This conclusion could not have been rationally reached if the Legislature had been aware of the "obscure and generally forgotten" elective provision of the Compact.[125]

IV. IS DENIAL OF TAXPAYER'S RIGHT TO ELECT THREE-FACTOR APPORTIONMENT A VIOLATION OF THE COMMERCE AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION?

The Court rejects arguments made by plaintiff that denial of a taxpayer's use of an equally weighted, three-factor apportionment formula is unconstitutional under the Commerce and Due Process Clauses of the United States Constitution.

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[124] Senate Legislative Analysis, SB 342, February 8, 1996. It was not just the Legislature and its constituents who failed to consider the potential impact of the Compact's elective provision. For example, at the House Tax Policy Committee hearing on SB 342 in September 1995, Marathon Oil, an out-of-state company with sales in Michigan but little or no payroll or property in the state, testified against the bill, suggesting that it was unfair to out-of-state taxpayers. *Michigan Single Sales Factor Bill Creates Controversy*, State Tax Notes, 95 STN 183-16 (September 21, 1995). If the Compact provisions had applied, there would have been no need for such testimony because any perceived unfairness would not have existed. See also Lane, *Committee Expects SBT Vote 'Thursday for Sure,'* Crain's Detroit Business, p 4 (October 9, 1995) (". . . major out-of-state corporations have fought against giving more weight to the sales factor in the SBT apportionment formula, calling instead for SBT relief they say would be more widespread and less selective.")

[125] See *W L Mead, Inc*, 217 F2d at 9.

First, plaintiff's constitutional claims are untimely. Under MCL 205.27a(7), "a claim for refund based upon the validity of a tax law based on the laws of the constitution of the United States or the state constitution of 1963" must be filed within 90 days after the due date set for the filing of the returns. Because plaintiff did not assert its constitutional claims within the 90 day period, no valid refund claim can be made on the basis of either Commerce Clause or due process violations.

Further, even if plaintiff had timely filed these constitutional claims, these very same issues were decided long ago by the Supreme Court in *Moorman*, 437 US at 274. There, the Court rejected the taxpayer's assertion that it is unconstitutional to require an out-of-state company to use Iowa's single sales factor apportionment formula rather than an equally weighted, three-factor formula. The Court stated:

> The only conceivable constitutional basis for invalidating the Iowa statute would be that the Commerce Clause prohibits any overlap in the computation of taxable income by the States. If the Constitution were read to mandate such precision in interstate taxation, the consequences would extend far beyond this particular case. For some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income. Accepting appellant's view of the Constitution, therefore, would require extensive judicial lawmaking.[126]

The Court further noted that it is for Congress, not the Court, to decide whether a particular uniform apportionment formula can be imposed on a state:

> It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions.[127]

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[126] *Moorman*, 437 US at 278.
[127] *Id*. at 280.

In conclusion, even if plaintiff's constitutional claims had been timely filed, denial of plaintiff's right to make an election to use an equally weighted, three-factor apportionment formula does not violate either the Due Process or Commerce Clauses of the United States Constitution.

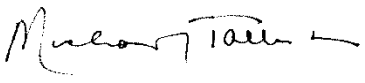
V. CONCLUSION

The Court, in fulfilling its duty to ascertain and apply the intent of the Legislature, finds that the taxpayer is required to use the apportionment formulas mandated under the SBTA for the tax years in question, and is not entitled to elect a different apportionment formula under the Compact. Though the SBT is an income tax within the meaning of the Compact, future legislatures were not bound by the policies of the legislature that enacted 1969 PA 343. The purpose of state tax uniformity as embedded in both the Compact's apportionment elective provision by the 1969 legislature, and the SBTA's equally weighted, three-factor apportionment formula as originally enacted by the 1975 legislature, is not consistent with the purpose of later amendments made to apportionment formulas by the Legislature. Under traditional rules of statutory construction, the apportionment formula under the SBTA for the tax years in question must control.

IT IS HEREBY ORDERED that summary disposition is granted to defendant pursuant to MCR 2.116(I)(2).

This order resolves the last pending claim and closes the case.

Dated:



Hon. Michael J. Talbot
Chief Judge, Court of Claims