

## Income/Franchise:

### Michigan Appellate Court Says Alternative Apportionment Warranted for Deemed Asset Sale Gain

*Case No. 345462*, Mich. Ct. App. (9/30/21). On remand from the Michigan Supreme Court in a case involving the gain on sale of an out-of-state business pursuant to an Internal Revenue Code section 338(h)(10) election and application of the standard statutory apportionment formula under the Michigan business tax (MBT) for the prior short-year at issue, the Michigan Court of Appeals (Court) reaffirmed its 2020 ruling in the same case – holding in the taxpayer’s favor that applying the standard formula to the circumstances in this case runs afoul of the Due Process and Commerce Clauses. In doing so, the Court explains that it adopts the analysis in its 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” and that “an alternate method of apportionment must be adopted.” Accordingly, the Court vacated the underlying tax assessment and penalty and remanded the case to the trial court with directions to determine an appropriate alternate apportionment method “if the parties are unable to agree upon one.” In the underlying case, the Michigan Department of Treasury declined allowing calculation under the taxpayer’s proposed alternative apportionment formula and applied the standard statutory formula, which resulted in Michigan taxing approximately 70% of the gain on the sale.

**URL:** [https://www.courts.michigan.gov/4a751f/siteassets/case-documents/uploads/opinions/final/coa/20210930\\_c345462\\_54\\_345462o.opn.pdf](https://www.courts.michigan.gov/4a751f/siteassets/case-documents/uploads/opinions/final/coa/20210930_c345462_54_345462o.opn.pdf)

This opinion follows the Michigan Court of Claims ruling from earlier this year in the same case [see *State Tax Matters*, Issue 2021-38, for more details on this earlier ruling], which held on remand from the Michigan Supreme Court and Michigan Court of Appeals on a narrower issue that the proper method for calculating the amount of tax due under the MBT standard formula is to exclude such gain from the sales factor denominator. Please contact us with any questions.

**URL:** [https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/STM/210924\\_2.html](https://dhub.blob.core.windows.net/dhub/Newsletters/Tax/2021/STM/210924_2.html)

— Pat Fitzgerald (Detroit)  
Managing Director  
Deloitte Tax LLP  
pfitzgerald@deloitte.com

Stephanie LaFave (Detroit)  
Senior Manager  
Deloitte Tax LLP  
slafave@deloitte.com

Drew Werner (Detroit)  
Senior Manager  
Deloitte Tax LLP  
anwerner@deloitte.com

This document contains general information only and Deloitte is not, by means of this document, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This document is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. Deloitte shall not be responsible for any loss sustained by any person who relies on this document.

**About Deloitte**

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. In the United States, Deloitte refers to one or more of the US member firms of DTTL, their related entities that operate using the “Deloitte” name in the United States and their respective affiliates. Certain services may not be available to attest clients under the rules and regulations of public accounting. Please see [www.deloitte.com/about](http://www.deloitte.com/about) to learn more about our global network of member firms.