

Michigan Department of TREASURY UPDATE

November 2021

Published by the Tax Policy Division of the Michigan Department of Treasury

TAX TRIBUNAL: USING ASSESSMENT APPEAL TO REEXAMINE FINAL, UNCHALLENGED ADJUSTMENTS IS PROHIBITED COLLATERAL ATTACK

In its Opinion and Judgment in *Hertz Corporation and Affiliates v Dep't of Treasury*, issued October 8, 2021, the Michigan Tax Tribunal addressed the question of whether Petitioner could use a timely appeal of an assessment for an open tax year to challenge prior unchallenged (and therefore final) Treasury adjustments for earlier tax years, which adjustments ultimately resulted in the assessment at issue in the open tax year. Treasury argued that using an appeal in this manner constituted an impermissible collateral attack on those earlier final assessments, and the Tax Tribunal agreed, granting Treasury's motion for summary disposition and denying Petitioner's. Specifically, Petitioner filed a Corporate Income Tax (CIT) return for 2012 claiming a tax overpayment credit, which Treasury denied. The claimed overpayment credit originated with investment tax credits (ITCs) that a related entity (DTG) claimed on its 2009 through 2011 Michigan Business Tax (MBT) returns and carried forward to 2012. Petitioner acquired DTG in 2012 and applied the overpayment credit to eliminate Petitioner's 2012 CIT liability.

Treasury denied Petitioner's claimed 2012 overpayment credit because it had previously denied DTG's original ITC claims and subsequent overpayment credit claims. As DTG failed to challenge those denials, they became final under section 22(4) of the Revenue Act MCL 205.22(4), which states that any assessment, decision, or order of Treasury that is not appealed in accordance with this section, is "final and is not reviewable in any court by mandamus, appeal, or other method of direct or collateral attack."

Treasury issued a final assessment for Petitioner's 2012 CIT liability in 2019, which Petitioner timely appealed. Petitioner argued that because it had timely appealed the 2012 assessment, the ITC and overpayment credit denials resulting in that assessment could be reexamined. Treasury argued that those unchallenged denials were now final and unreviewable under MCL 205.22(4).

The Tribunal agreed with Treasury, finding that "because DTG's final assessments for the 2009, 2010, and 2011 tax years were not timely appealed, they cannot be altered or undone." The Tribunal found that the final assessments "finally and conclusively established DTG's MBT liability, which included the disallowance of the ITCs." The Tribunal further found the intent of appeal provision in MCL 205.22(4) was to prevent reexamination of decisions by either directly or collaterally attacking them.

The Petitioner has appealed the Tribunal's decision to the Michigan Court of Appeals.

IN THIS ISSUE

Pages 1

Tax Tribunal: Using Assessment Appeal to Reexamine Final, Unchallenged Adjustments is Prohibited Collateral Attack

Page 2

Court of Appeals Holds that Treasury's Reduction of Credit Carryforward Did Not Violate Four-Year Statute of Limitations

Page 2

About Treasury Update

Page 2

Recently Issued Guidance from Treasury

Page 3

Which Bucket?: Determining Whether a Sales Transaction Is Taxed Under Sales Tax or Use Tax

Page 3

In Opinion After Remand, Court of Appeals Rules Treasury Properly Applied Statutory Apportionment Formula Under the MBT, Remands A Second Time to Court of Claims to Determine an Alternate Apportionment Method

COURT OF APPEALS HOLDS THAT TREASURY'S REDUCTION OF CREDIT CARRYFORWARD DID NOT VIOLATE FOUR-YEAR STATUTE OF LIMITATIONS

On October 14, 2021, the Michigan Court of Appeal's issued its unpublished opinion in *McLane Company, Inc v Dep't of Treasury*, (No. 354973), in which it held that Treasury's adjustment to an overpayment credit due to an earlier refund was not an assessment barred by the four-year statute of limitations under the Revenue Act.

Treasury audited the taxpayer's Michigan Business Tax (MBT) returns for tax years 2008 through 2010 and determined that the taxpayer was owed a credit for those tax years. The taxpayer agreed with the audit findings and Treasury issued a check to the taxpayer for the total net credit. The taxpayer cashed the refund check, which included a prior-year overpayment credit that the taxpayer had claimed on its 2011 return. After the conclusion of the audit in 2017, Treasury processed the 2011 return and notified the taxpayer in February 2018 that it was adjusting the overpayment credit reported on the 2011 return. Treasury's adjustment did not, however, result in the taxpayer having to pay a liability related to the 2011 return; rather, it resulted in reducing the overpayment credit that could be carried forward.

The taxpayer appealed Treasury's adjustment to the Court of Claims. At the Court of Claims, the taxpayer argued that Treasury's formal notice of the adjustment to the overpayment credit carryforward was an assessment of a tax deficiency, and was precluded because it was issued beyond the 4-year statute of limitation period for Treasury to issue an assessment, under section 27a(2) of the Revenue Act, MCL 205.27a(2). Treasury argued there was no assessment of tax issued, the adjustment to the return was proper, and that the reduction of the overpayment credit was not a tax deficiency and thus did not violate the four-year statute of limitations. Treasury also noted that the taxpayer had previously been refunded the amount of the disputed credit as part of the determination for the audit years.

The Court of Claims held for Treasury, concluding that the reduction of a credit that does not result in a tax deficit owed by the taxpayer cannot be a "deficiency" under the act. While the term "deficiency" is not explicitly defined in the statute or Treasury's rules, the court reviewed dictionary definitions and statutory context to interpret the term's meaning. The court concluded that, when the credit reduction results in a lower credit to carry forward to the next year, there is no deficiency to be paid by the taxpayer.

The taxpayer appealed the court's decision to the Court of Appeals, which affirmed the court's decision. The Court of Appeals agreed that Treasury's adjustment in 2018 of a prior-year overpayment credit that the taxpayer had claimed on its 2011 MBT return did not violate the statute of limitations under MCL 205.27a(2) to issue an assessment because the adjustment did not involve an assessed "deficiency." The Court of Appeals reasoned that Treasury's disallowance of the claimed credit in effect offset Treasury's earlier refund payment that had included the value of that claimed credit.

The Court of Appeals stated there was a primary and a secondary effect of Treasury's adjustment. The primary effect of Treasury's action was the disallowance of a claimed credit. The secondary effect of the disallowance might—or might not—result in additional tax being owed by the taxpayer. In this case, Treasury's disallowance did not result in additional tax being owed, since the taxpayer still had an albeit reduced credit remaining, and the taxpayer did not have to pay a tax deficit. The Court of Appeals thus noted that it is inaccurate to characterize Treasury's adjustment as an assessment of a "deficiency," because whether there is a tax deficit to pay is merely a potential secondary effect of Treasury's disallowance of the credit.

This Court of Appeal's opinion was unpublished. As of the date of publication of this article, the taxpayer has not sought leave to appeal the opinion to the Michigan Supreme Court.

ABOUT TREASURY UPDATE

Treasury Update is a periodic publication of the Tax Policy Division of the Michigan Department of Treasury.

It is distributed for general information purposes only and discusses topics of broad applicability. It is not intended to constitute legal, tax or other advice. For information or advice regarding your specific tax situation, contact your tax professional.

For questions, ideas for future newsletter or Revenue Administrative Bulletin topics, or suggestions for improving Treasury Update, contact:

Lance Wilkinson

Director, Tax Policy Bureau
517-335-7477

Stewart Binke

Administrator, Tax Policy Division
517-335-7478

Email address:

Treas_Tax_Policy@michigan.gov

RECENTLY ISSUED GUIDANCE FROM TREASURY

Notices

- Notice of Tax Rate Calculation on Gross Premiums Attributable to Qualified Health Plans for Tax Year 2021 Issued October 14, 2021.
- Notice Concerning Inflation Adjusted Fuel Tax Act and Applicable to IFTA Motor Carriers That Will Take Effect on January 1, 2022, Issued November 16, 2021.

WHICH BUCKET?: DETERMINING WHETHER A SALES TRANSACTION IS TAXED UNDER SALES TAX OR USE TAX

When must a seller report a sale as sales tax and when should a seller report a sale as use tax? This question became more important due to the U.S. Supreme Court's decision in *South Dakota v Wayfair*, 585 US _____; 138 S Ct 2080 (2018), which upheld the constitutionality of so-called "economic nexus" in the context of sales and use taxes. Shortly after the decision in *Wayfair*, Treasury adopted the economic nexus policy in Revenue Administrative Bulletin (RAB) 2018-16, effective October 1, 2018, requiring remote sellers with sales exceeding \$100,000 to – or 200 or more transactions with – Michigan purchasers in the previous calendar year to remit sales or use tax on all of its taxable sales into Michigan and file all required returns. This policy was later codified into statute by Public Acts 145 and 146 of 2019.

Because it was anticipated that this change in policy would result in a substantial increase in remote sellers being required to register and remit tax, RAB 2018-16 explains when sales should be reported and remitted as sales tax or use tax. Specifically, the RAB provides:

- **Sales tax transaction:** The seller has nexus with Michigan and transfer of ownership of the property occurs inside Michigan.

- **Use tax transaction:** Either the seller does not have nexus with Michigan but nevertheless voluntarily collects and remits tax, or the seller has nexus with Michigan, however, transfer of ownership occurs outside of Michigan.

Generally, retail sales made by businesses located in Michigan to Michigan customers will be sales tax transactions. However, determining where ownership transfers when the seller is located in another state is a fact intensive inquiry. Important factors to consider include, but are not limited to, where the sales transactions are approved by the seller, where a sales contract is fully executed, and where title to the property transfers to the purchaser.

If a seller remits the proper amount of tax, but incorrectly reports it as sales tax when it should have been reported as use tax, and vice versa, Treasury will not assess the seller. However, the seller should file amended returns correcting the reporting of the tax because sales and use tax revenues are distributed to different sources and different governmental functions.

IN OPINION AFTER REMAND, COURT OF APPEALS RULES TREASURY PROPERLY APPLIED STATUTORY APPORTIONMENT FORMULA UNDER THE MBT, REMANDS A SECOND TIME TO COURT OF CLAIMS TO DETERMINE AN ALTERNATE APPORTIONMENT METHOD

Vectren Infrastructure Services Corp v Dep't of Treasury has proceeded through two rounds of appellate review, recently resulting in the September 29, 2021, published opinion issued by the Michigan Court of Appeals. For background, please refer to the discussion of the facts and prior decisions in the June 2020 and August 2021 editions of *Treasury Update*.

In its opinion, the Court of Appeals agreed with the Court of Claims' analysis and found that the court correctly determined that the proper interpretation of the MBT supports Treasury's application of the statutory formula and

rejected the taxpayer's challenge to it. However, the Court of Appeals again found that, under the specific facts of this case, the application of the statutory formula resulted in gross distortion constituting a constitutional defect. The Court of Appeals again vacated Treasury's assessment and again remanded the matter to the Court of Claims for the parties to agree upon an appropriate alternate apportionment method and, if unable to do so, directed the Court of Claims to adopt one.

Treasury has sought leave to appeal the Court of Appeals' most recent opinion to the Supreme Court.



Archives of Treasury Update can be found on the website at Michigan.gov/Treasury under the Reports and Legal Resources tab.