

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UNPUBLISHED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.

Riordan, J. (*concurring*)

For the reasons set forth below, I concur with the majority's opinion in all respects except regarding the issue of repeal by implication.

As recognized by the Michigan Supreme Court, repeals by implication are disfavored. *Wayne Co Prosecutor v Dep't of Corr*, 451 Mich 569, 576; 548 NW2d 900 (1996); *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 491; 618 NW2d 1 (2000). Repeals by implication "will not be indulged in if there is any other reasonable construction." *Knauff*, 240 Mich App at 491-492 (quotation marks and citations omitted). This reluctant approach to repeals by implication is a result of our recognition that "if the Legislature intended to repeal a statute or a statutory provision, it would have expressly done so." *Id.* at 491. The party asserting a repeal by implication also bears a heavy burden, one that is not easily satisfied. *Id.* at 492.

In light of our Supreme Court's admonishment regarding repeals by implication, I conclude that the Business Tax Act did not repeal by implication the Compact. The Business Tax Act, MCL 208.1309(1), provides that a taxpayer may use a different method of calculation if the taxpayer petitions for an alternate method of calculation. This is harmonious with the provision in the Compact, MCL 205.581, which allows for different methods of calculation. While the Business Tax Act certainly makes it more difficult for a taxpayer to use a different method of calculation, that difficulty does not render it irreconcilably inconsistent with the Compact.

Nevertheless, the plain language of the Business Tax Act states that "[e]xcept as otherwise provided in this act, each tax base established under this act *shall* be apportioned in accordance with this chapter." MCL 208.1301(1) (emphasis added). Since "shall" is a mandatory term, *Janer v Barnes*, 288 Mich App 735, 737; 795 NW2d 183 (2010), the plain language of the Business Tax Act requires apportionment to be based on the method set forth in the Business Tax Act. Thus, as the majority recognizes, IBM was required to compute its tax liability based on the formula set forth in the Business Tax Act.

Therefore, I concur only with the majority's conclusion that IBM was required to compute its tax liability pursuant to the method of calculation set forth in the Business Tax Act.

/s/ Michael J. Riordan